BACKGROUND PAPER – INQUIRY INTO CAPS ON THIRD-PARTY CAMPAIGNERS' ELECTORAL EXPENDITURE IN S 29(11) AND S 35 OF THE *ELECTORAL FUNDING ACT 2018*

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This paper has been written for the purpose of informing the Joint Standing Committee on Electoral Matters on matters relevant to its inquiry into caps on third-party campaigners' electoral expenditure and the 'acting in concert' provisions in the *Electoral Funding Act 2018* (NSW).

The paper commences in Part I by noting the terms of reference for the inquiry and the meaning of the relevant terminology. Part II considers the background to this inquiry. It discusses the development of the regulation of campaign finance in New South Wales, with a particular focus on provisions concerning third-party campaigners. It then sets out the current position in relation to both provisions.

Part III addresses the constitutional constraints upon enacting and altering laws concerning third-party campaigners. It explains the test the High Court has developed to determine when there is a breach of the constitutional implication of freedom of political communication.

Part IV addresses practical matters, such as the need for sufficient evidence and the incentives that may be created by alterations.

Part V addresses the comparative situation in the Australian States and Territories and in other comparable countries.

Part I – Terms of reference and terminology

The terms of reference provide:

> That the Joint Standing Committee on Electoral Matters inquire into and report on:
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> 1. whether the existing cap on electoral expenditure by third-party campaigners for an Assembly byelection 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applicable cap on electoral expenditure in section 35 of the Electoral Funding Act 2018 should be retained, amended or repealed.

A 'third-party campaigner' is a person or entity (not being a party, candidate or an associated entity which acts for them) who is registered as a third-party campaigner or who spends more than $2000 in 'electoral expenditure' for a State election during a 'capped State expenditure period'. The capped State expenditure period runs from 1 October in the year before a general election until the end of election day, which is around 6 months. In relation to a by-election, it runs from the issue of the writ until election day, which is around 3-4 weeks.

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'Electoral expenditure' is the spending of money on promoting or opposing a party or candidates at an election or seeking to influence voting at the election. It can include spending money on advertisements, how-to-vote cards, election posters, internet communications and research associated with the campaign.

Registered third-party campaigners at the 2019 election included trade unions, religious groups (eg the Australian Christian Lobby), business groups (eg Australian Hotels Association NSW, Airbnb Australia Pty Ltd, NSW Business Chamber Ltd and NSW Minerals Council Ltd), charities (eg NSW Disability Advocacy Alliance) environmental groups (eg Greenpeace Australia Pacific Ltd, Invasive Species Council Inc and Nature Conservation Council of NSW), those with particular interests in government (eg the Local Government and Shires Association of NSW and the Public Service Association of NSW) and those seeking to influence policy (eg No CSG in Barwon, Powerhouse Museum Alliance, Relocate Tweed Valley Hospital Assn, and Stop the Tunnels).[1]

The narrow questions asked of this Committee inquiry concern the adequacy or reassessment of the cap on expenditure by third-party campaigners with respect to by-elections (rather than general elections) and whether the current provision banning third-party campaigners acting in concert in spending on election campaigns should be kept, altered or repealed. But to understand these narrow questions, it is necessary to understand the broader history of the development of limits on third-party campaigners in relation to elections (not just by-elections) and the constitutional constraints upon those limits.

Part II – Background and current position

The Keneally Government reforms

In 2010 the Keneally Labor Government introduced a scheme for the regulation of political donations and expenditure,[2] which included imposing caps upon political donations and campaign expenditure and an increase in public funding.

The expenditure caps applied to electoral communications in the period from 1 October prior to a general election until polling day. The caps for Legislative Assembly candidates were $100,000 for each candidate endorsed by a party and $150,000 for each independent. By-election candidates had a higher cap of $200,000, with any party spending in a by-election coming under the candidate's cap. The caps for parties were $100,000 per electorate in which the party ran endorsed candidates (around $9.3 million if a party endorsed candidates in all Legislative Assembly seats) and a maximum of $1,050,000 for any party endorsing candidates in the Legislative Council, but with 10 or fewer endorsed candidates in the Legislative Assembly (hereafter described as a 'minor party'). Parties also could not spend more than $50,000 in an electorate, to prevent 'sand-bagging' marginal electorates.

In addition to imposing caps on the expenditure of candidates and parties, caps were also imposed upon third-party campaigners. This was for two reasons. First, it ensured that parties

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[1] NSW Electoral Commission, Register of Third-Party Campaigners 2019: https://www.elections.nsw.gov.au/getmedia/f3eb4182-f051-4f69-8cd9-28624e6e5029/State-Register-of-Third-Party-Campaigners.

[2] *Election Funding and Disclosures Amendment Act* 2010 (NSW).

and candidates did not avoid their cap by getting third parties to campaign as surrogates for them. Second, it prevented political parties and candidates from being swamped by the electoral campaigns of well-funded interest groups, as can happen in the United States.

Third-party campaigners that spent more than $2000 on electoral expenditure prior to a general election had to be registered. They then became subject to disclosure laws, but could spend up to a cap of $1,050,000 (or $525,000 for those registering after 1 January in an election year), with a limit of $20,000 in any one electorate. Where a by-election was held for a seat in the Legislative Assembly, the cap for a third-party campaigner was $20,000 for each by-election.[3] This was the same amount as could be spent in any one electorate during a general election. In comparison, candidates in by-elections could spend more ($200,000) than if they were standing in a general election ($100,000 – or $150,000 if an independent candidate).

The general intention was to permit third-party campaigners to spend a reasonable amount to fund a campaign and get their messages across to voters, but not to allow their voices to overwhelm the campaign, especially in the face of caps on the expenditure of parties and candidates. In effect, a third-party campaigner could spend up to the same amount as a minor party in a general election, but proportionately much less in a by-election.

The Premier noted at the time that the objects behind these constraints included providing a 'more level playing field for candidates seeking election, as well as for third parties who wish to participate in political debate'.[4] She wanted to prevent political campaigns from being dominated by those with the money to produce the loudest voice, and stated that the law was intended to 'give voters a better opportunity to be fully and fairly informed of the policies of all political parties, candidates and interested third parties'.[5]

The O'Farrell Government reforms

The O'Farrell Coalition Government made further reforms in 2012.[6] It took the view that only those who had the right to vote should be able to donate to political parties. This meant that corporations, unions, charities, peak community bodies, clubs and other bodies could not make political donations. The same was true of individuals not on the electoral roll, such as most non-citizens.

In addition, the 2012 law aggregated the expenditure of political parties and affiliated organisations. This applied to organisations that were involved in the governance of a political party, such as by appointing delegates to its governing body or participating in the pre-selection of candidates. It was intended to be an anti-avoidance mechanism, so that a party could not thwart the application of its own cap by spending through a third-party to which it was affiliated.

Even though these reforms did not directly affect the expenditure cap on third-party campaigners, they did have an indirect effect. This was because the prohibition on receiving political donations from anyone but a person on the electoral roll also extended to third-party campaigners. In practice, small community-based groups, including charities, environmental

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[3] *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s 95F(11).

[4] NSW, *Parliamentary Debates,* Legislative Assembly, 28 October 2010, p 27168 (Kristina Keneally).

[5] NSW, *Parliamentary Debates,* Legislative Assembly, 28 October 2010, p 27168 (Kristina Keneally).

[6] *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW).

groups and religious groups, band together and provide money to a peak body (eg the NSW Council of Social Service) to undertake a third-party campaign on their behalf. However, under this 2012 law, they could not donate that money to a peak body to be spent on electoral campaigning. In addition, if they decided to campaign on their own, they would have to be able to assert that the money spent came only from donations by individuals on the electoral roll. Small charities and community groups did not have the infrastructure to identify which of their donations came from persons on the electoral roll, and it would have been too expensive administratively to check.

The likely effect would have been to silence the voices of third-party campaigners that rely on donations from grass-roots bodies or from individual donations, while the voices of corporations or other bodies that finance their campaigns through business activities could still effectively be heard, supported by expenditure up to the cap.

As a consequence of this concern, which was raised in a parliamentary committee,[7] the definition of 'electoral expenditure' was changed to exclude expenditure on 'issues' campaigns. The idea was that charities and other community groups could still run campaigns about particular issues relevant to the people that they serve, without falling within the cap and other restrictions relating to electoral expenditure, if the expenditure was not for 'the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.'[8] However, as almost all 'issues campaigns' are run for the purpose of influencing voting at elections, this amendment did not resolve the problem.

As discussed below, in 2013 the High Court struck down the validity of the O'Farrell Government's 2012 reforms that restricted political donations so that they could only be made by persons on the electoral roll and that aggregated the expenditure of political parties and their affiliates.

The law was then amended in 2014 to reinstate earlier provisions that required political donations to come from persons on the electoral roll or entities which have an Australia Business Number or other identifying number allocated by ASIC.[9] The intention was to exclude donations from persons or bodies outside Australia that have no presence in Australia.

Review of third-party expenditure caps

In 2014 a review of the campaign finance laws was conducted by an Expert Panel. In the course of that review, concerns were raised that the expenditure cap for third-party campaigners was too high and might result in the development of US-style political action committees in Australia. The Expert Panel recognised this concern and considered that the cap should be reduced. But it also suggested that the Government should assess the 2015 campaign expenditure figures in reviewing the cap.[10]

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[7] NSW, Legislative Council Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, 'Inquiry into the Provisions of the *Election Funding, Expenditure and Disclosures Amendment Bill* 2011', (February 2012) 89-107.

[8] *Election Funding, Expenditures and Disclosures Act 1981* (NSW), s 87(4). This qualification is retained in the current Act: *Electoral Funding Act 2018* (NSW), s 7(3).

[9] *Election Funding, Expenditure and Disclosures Consequential Amendment Act* 2014 (NSW).

[10] Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, pp 109-112.

This was re-visited in 2016 by the Joint Standing Committee on Electoral Matters, which recommended that before reducing the cap to an amount such as $500,000, the NSW Government consider evidence as to whether a third-party campaigner could reasonably present its case within that cap.[11]

The Berejiklian Government reforms

In 2018, the law concerning political donations and electoral expenditure was re-written and a new *Electoral Funding Act 2018* (NSW) was passed. It cut the expenditure cap for third-party campaigners to $500,000, up-ending the relative balance between the caps that had been set in 2010.

The expenditure caps that had originally been set in 2010 were indexed. At the time they were established, a major party could spend approximately 9 times as much as a third-party campaigner and a minor party could spend the same amount as a third-party campaigner. The rationale for the difference between the cap for major parties and minor parties/third-party campaigners was that the major parties have to campaign in every electorate and on all issues, whereas minor parties and third-party campaigners can direct their campaigns at a smaller number of specific issues, resulting in lower campaign costs.[12] A rationale for the equivalent treatment of minor parties and third-party campaigners was that if minor parties had a higher cap, then third party campaigners would have a perverse incentive instead to run candidates in the Legislative Council election to gain a higher expenditure cap, taking New South Wales back to a table-cloth sized ballot paper it had faced in 1999.[13]

Under the 2018 provisions, the expenditure cap for registered third-party campaigners was cut to $500,000, while the expenditure cap for minor parties rose to $1,288,500. Major parties had an expenditure cap of $11,429,700. A major party could spend nearly 23 times as much as a third-party campaigner (when it used to be 9 times as much), and a minor party could spend more than twice as much (when it used to have the same cap). Third-party campaigners could spend less than half as much as they previously could. This raised questions as to whether $500,000 was sufficient to fund a reasonable campaign and whether the change in ratios between the caps for third-party campaigners and major parties was for a legitimate purpose and was constitutionally valid.

In addition, the 2018 Act introduced a new provision which made it an offence for third-party campaigners to 'act in concert' in incurring electoral expenditure that exceeded the cap on any one of them. This had the effect of aggregating their expenditure caps if they acted under a formal or informal agreement with the principal object of supporting or opposing the election of a particular candidate or party.

Both the expenditure cap reduction for third-party campaigners and the 'acting in concert' provisions were challenged in the High Court. As discussed below, the challenge succeeded,[14] with the expenditure cap provision being held invalid. As there was no valid cap, this left the

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[11] Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations* (June 2016), pp 46-49.

[12] This rationale was accepted by the High Court in *Unions NSW (No 2)* [2019] HCA 1, [29] (Kiefel CJ, Bell and Keane JJ).

[13] Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, p 110.

[14] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595.

'acting in concert' provision ineffective (as there was no cap that could be exceeded), so the Court did not need to decide on its validity.[15]

The High Court's judgment was handed down in the middle of an election campaign. The effect was to leave no expenditure cap to limit third-party campaigners. On 8 February 2019 a Regulation[16] came into effect which restored the previous cap on third-party campaigners for a temporary period until 31 December 2019. This cap was the same one as for minor parties, being $1,288,500. It effectively preserved the pre-2018 position. As the reinstatement of the cap would have enlivened the 'acting in concert' provision again, raising the issue of its validity, the Regulation averted the problem by providing it did not apply.

Current position – Third-party campaigner expenditure caps

As the temporary Regulation expired at the end of 2019, there is currently no cap on expenditure for third-party campaigners at a general election. Section 29(1) of the *Election Funding Act 2018,* which set out the old cap of $500,000 has not been repealed, but a note has been added that it was declared by the High Court as invalid. The Government needs to take action soon to identify the evidence that would support a new cap, if it desires to reimpose third party expenditure caps prior to the commencement of the next pre-election period which will commence on 1 October 2022.

The cap for third-party campaigners at Legislative Assembly by-elections, however, was not challenged in the High Court and continues to apply. That cap is currently $21,600 due to indexation,[17] in comparison to the cap for a candidate at a Legislative Assembly by-election, which is now $265,000. Accordingly, a candidate can spend just over 12 times more than a third-party campaigner in a by-election. Back in 2010, when the scheme began, a candidate could spend 10 times more than a third-party campaigner in a by-election ($200,000, as opposed to $20,000).

As a point of comparison, the expenditure caps which will apply to the 2023 general election (taking into account indexing) are $132,600 per electoral district for the major parties, amounting to $12,331,800 if candidates are run in all 93 electorates. Minor parties have a cap of $1,389,900 and independents and ungrouped candidates have a cap of $198,700. The internal cap to prevent electorate sand-bagging is $66,400 per electorate within a party's overall cap.[18]

Current position – Acting in concert provisions

It is unlawful, under s 33 of the *Election Funding Act*, for a political party, candidate, third-party campaigner or associated entity to incur electoral expenditure that exceeds its cap. To prevent the effectiveness of the cap being thwarted by parties or candidates creating separate front organisations to engage in electoral expenditure to advance their cause, there are measures

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[15] Only Justice Edelman decided the matter, finding that the 'acting in concert' provision was invalid.

[16] *Electoral Funding Amendment (Savings and Transitional) Regulation 2019* (NSW).

[17] See *Election Funding Act 2018* (NSW), s 29(11), which set it initially at $20,000, as modified by indexation as per Schedule 1. There is also an electoral district cap in s 29(12) for third-party campaigners of $26,700 within their overall expenditure cap.

[18] For details on current caps, taking into account indexing, see: https://www.elections.nsw.gov.au/Funding-and-disclosure/Electoral-expenditure/Caps-on-electoral-expenditure/What-are-the-expenditure-caps-for-State-elections.

that aggregate the expenditure caps of an 'associated entity'[19] with the party or elected member it is supporting.[20]

In addition, s 35 deals with third-party campaigners acting in concert with others in their electoral campaigning. Section 35 says:

> (1) It is unlawful for a third-party campaigner 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.
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> (2) In this section, a person **"acts in concert"** with another person if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of—
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> (a) having a particular party, elected member or candidate elected, or
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> (b) opposing the election of a particular party, elected member or candidate.

The idea here is to prevent different third-party campaigners coordinating amongst themselves to undertake a larger campaign in an effective manner. An example is the 'NSW Not For Sale' campaign which was supported by a number of separate unions as well as the peak body.[21] There are also, as noted above, significant numbers of businesses that have common interests and might seek to coordinate a campaign, as indeed, might environmental groups or religious groups. This provision is not addressed at parties creating front organisations to exploit the expenditure cap, but rather it is about preventing like-minded groups from joining together so that they can run more effective or widespread advertisements.[22]

An equivalent provision had previously been enacted in the Australian Capital Territory, but was repealed due to concerns about its constitutional validity. In 2021, a parliamentary committee recommended that it be reinstated, but 'in terms that comply with recent High Court judgments'.[23]

Part III – The constitutional constraints

Third-party campaigners

The importance of third-party campaigners to the democratic process was first recognised by the High Court in 1992 in the case that established there is a constitutionally implied freedom of political communication. In the *ACTV* case, a majority of the Court found that provisions

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[19] An 'associated entity' is a corporation or other entity that operates solely for the benefit of a political party or elected member.

[20] *Election Funding Act 2018* (NSW), s 30(4).

[21] The campaign was jointly funded by Unions NSW, Electrical Trades Union, Health Services Union, NSW Teachers Federation and the United Services Union: https://www.nswnma.asn.au/nsw-not-for-sale-launch/.

[22] Note the debate on this issue in the NSW Legislative Council, where the two issues seem to have been conflated by some Members: NSW, *Parliamentary Debates,* Legislative Council, 30 March 2022, pp 73-77 (proofs).

[23] ACT, Standing Committee on Justice and Community Safety, 'Inquiry into the 2020 ACT Election and the Electoral Act', August 2021, pp 71-73.

banning third-parties from advertising their political views on electronic media during an election campaign were constitutionally invalid.[24] This was because the law unduly burdened the implied freedom of political communication that was necessary to support voters in making a genuine choice in electing Members of Parliament.

In 2013, in *Unions NSW (No 1),* the High Court again made a critical intervention in favour of third-party campaigners. This time it struck down the validity of the O'Farrell Government's reforms, which had sought to restrict the sources of political donations so that only individuals on the electoral roll could make them. First, the Court held that the implied freedom of political communication, despite being derived from the Commonwealth Constitution, also limits the power of the NSW Parliament to make campaign finance laws.[25]

Second, the Court concluded that non-voters, be they individuals or entities based in Australia (such as unions, corporations and charities), are affected by the decisions of governments and have a legitimate interest in governmental action and policy. Accordingly, they may legitimately seek to influence who governs by supporting candidates and political parties in an election and contributing to political discussion.[26] A law that burdens the freedom to do so will be invalid unless it is for a legitimate purpose and meets a proportionality test. In this case, the High Court found that the law was not supported by a legitimate purpose and was therefore invalid.[27]

The test for when an electoral finance law breaches the constitutional implied freedom was further developed in the case of *McCloy v New South Wales.*[28] This case involved a challenge to the NSW campaign finance laws that capped political donations and banned property developers from making donations. The test[29] involves asking three questions:

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

In answering the last of these questions, a majority of the Court adopted a 'structured proportionality' test, asking whether a law is (a) suitable (i.e. it has a rational connection to its

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[24] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 145 (Mason CJ); 171-3 (Deane and Toohey JJ); 220-1 (Gaudron J); 236 (McHugh J).

[25] *Unions NSW (No 1)* (2013) 252 CLR 530, 548-551 [17]-[26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[26] *Unions NSW (No 1)* (2013) 252 CLR 530, 551-2 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at 580 [144].

[27] *Unions NSW (No 1)* (2013) 252 CLR 530, 556-560 [46]-[59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See further: Anne Twomey, '*Unions NSW v New South Wales:* Political Donations and the Implied Freedom of Political Communication' (2014) 16 *University of Notre Dame Australia Law Review* 178.

[28] *McCloy v New South Wales* (2015) 257 CLR 178.

[29] This test was first developed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8, and later revised in *Brown v Tasmania* (2017) 261 CLR 328, 364 [104] (Kiefel CJ, Bell and Keane J) and 416 [277] (Nettle J).

purpose); (b) necessary (i.e. there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom'); and (c) adequate in its balance (i.e. the importance of the purpose served by the law outweighs the extent of the restriction that it imposes on the freedom).[30]

In answering these questions, the Court accepted that the Constitution guaranteed a system of representative democracy that entails equality of opportunity to participate in the exercise of political sovereignty. Their Honours considered that this meant that it could be a legitimate purpose of legislation to achieve a 'level playing field'.[31] Uncontrolled use of wealth in election campaigns could mean that the voices of the rich drown out other political views. It was therefore consistent with the system of representative democracy for a law to subdue the voices of the rich, by placing caps on donations, in order to enhance a wider range of participation in political discussion.[32]

The final important case was *Unions NSW (No 2)*.[33] This case involved a challenge to the provision in the 2018 reforms which cut the cap for third-party campaigners in the six months prior to a general election from $1,050,000 to $500,000 and to the 'acting in concert' provision (discussed below).

It was clear that the limitation on what a third-party campaigner could spend on electoral advertising burdened the implied freedom, as it limited the capacity of third-party campaigners to engage in political communication. Cutting the cap in half burdened the implied freedom even more. The first limb of the test was therefore satisfied.

The second limb concerns whether the purpose of the law is compatible with the constitutional system of representative and responsible government. The NSW Government had argued that political parties and candidates have a special status in the electoral system, because they are contesting the election, which allows them to be privileged over others involved in political debate. This argument had also previously been made by the Expert Panel when it recommended cutting the cap for third-party campaigners.[34] The High Court rejected this argument, concluding that the Constitution does not impliedly privilege parties. It instead guarantees equal participation in the exercise of political sovereignty.[35]

The only other legitimate purpose that could justify the law was that of levelling the playing field to prevent voices from being drowned out by well-funded campaigns. All the Justices accepted that this was a legitimate purpose as it enhances political communication by expanding the sources of it.[36] It was also generally accepted, including by Unions NSW, that the cap for third-party campaigners could justifiably be lower than that for political parties because parties had to deal with a wider variety of issues across every electorate, making their

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[30] *McCloy v New South Wales* (2015) 257 CLR 178, 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ).

[31] *McCloy v New South Wales* (2015) 257 CLR 178, 267 [41]-[42] (French CJ, Kiefel, Bell and Keane JJ); and [249] (Nettle J).

[32] *McCloy v New South Wales* (2015) 257 CLR 178, 207-8 [45]-[47] (French CJ, Kiefel, Bell and Keane JJ).

[33] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595. See further: Anne Twomey, '*Unions NSW v New South Wales (No 2)'* (2019) 30 *Public Law Review* 98, from which much of the discussion below is drawn.

[34] Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, 109.

[35] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [40] (Kiefel CJ, Bell and Keane JJ) and [159]-[160] (Edelman J).

[36] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [38] (Kiefel CJ, Bell and Keane JJ); [83] (Gageler J); [110] (Nettle J); [153] (Gordon J); [190] (Edelman J).

expenditure needs greater.[37] They could also potentially be overwhelmed by targeted campaigns by third-parties.[38] The question here, however, was whether the cut went too far and was not for the legitimate purpose of levelling the playing field. Most of the Justices skipped over finally determining that question, because they concluded that even if the purpose was a legitimate one, the law would fail the third limb of the test anyway.

The key point was that there was inadequate evidence to justify cutting the third-party campaigner cap. The initial cap had been established, having regard to the relativities with other campaign participants.[39] The Expert Panel had expressed concern about the prospect of third-party campaigners becoming too powerful in the future, but had not adequately justified cutting the cap to $500,000. It hadn't assessed whether a modest but effective campaign could be run for this amount. It had suggested that the Government reconsider the figure in the light of the 2015 election expenditure figures, which the Government had not done.

The Joint Standing Committee on Electoral Matters had also recommended that before reducing the cap to $500,000, the NSW Government consider evidence as to whether a third-party campaigner could reasonably present its case within that cap.[40] No such analysis was undertaken. The Court pointed out that if efforts had been made to make this assessment, the result of the case might have been different.[41]

The Court noted that there was no evidence that the prior cap was allowing wealthy voices to drown out others, which might have provided a rational connection to the purpose of levelling the playing field.[42] Without any evidence before it that justified the cut in the cap, the Court was unable to be satisfied that it was suitable or necessary. The consequence was that the provision was held to be invalid.

New South Wales had argued that it was a matter for Parliament, not the courts, to determine the cap and that the courts should defer to Parliament on its appropriate level. This was also rejected by the Court.[43] Where a New South Wales law imposes a burden on freedom of political communication, then it must be justified, and the NSW Government had failed to do so.[44]

Aggregation and acting in concert provisions

If the NSW Parliament can validly impose caps on political donations and expenditure by political parties and candidates, then it must also be able to enact provisions that prevent those caps being undermined or avoided by parties and candidates simply setting up separate bodies, with their own independent caps, that will engage in electoral expenditure that supports the

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[37] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [29] (Kiefel CJ, Bell and Keane JJ).

[38] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [90] (Gageler J).

[39] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [20] (Kiefel CJ, Bell and Keane JJ).

[40] Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations and the Government's Response* (June 2016), pp 46-49.

[41] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [53] (Kiefel CJ, Bell and Keane JJ).

[42] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [20] (Kiefel CJ, Bell and Keane JJ).

[43] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [51] (Kiefel CJ, Bell and Keane JJ).

[44] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [45] (Kiefel CJ, Bell and Keane JJ); [93]-[102] (Gageler J); [151] (Gordon J).

party or candidate. This has primarily been done by identifying 'associated entities' and aggregating their expenditure cap with that of the associated party or candidate.

Making such an assessment becomes more difficult when the separate entity already existed as an independent body and was not established for the purpose of circumventing the caps. To what extent should like-minded bodies be aggregated under the cap of a political party or candidate? This issue has proved particularly problematic with regard to unions, many of which pre-dated the establishment of the Australian Labor Party and which cannot be regarded as having been established for the purposes of breaching an expenditure cap.

In 2012 the NSW Parliament enacted a provision that aggregated the electoral communication expenditure incurred by a party and its 'affiliated organisations', so that it all fell within the party's cap. An 'affiliated organisation' was defined as a body or other organisation authorised under the rules of a party to appoint delegates to the governing body of the party or to participate in pre-selection of candidates for the party. In practice, it only applied to the ALP and its relationship to the unions. It did not pick up organisations that were closely aligned to other political parties. If the provision had applied more broadly and equitably across political parties, it might have been justified on the basis that it was intended to support a level playing field. But the fact that 'affiliated organisation' was narrowly defined to pick up a particular relationship affecting a particular party made this justification very difficult to establish.

The High Court, in *Unions NSW (No 1),* held that this provision burdened the implied freedom of political communication, as it limited the amount organisations, such as unions and the ALP, could spend on political communication. In applying the test for validity, the Court concluded that the law did not serve a legitimate end. It was not for the purposes of preventing corruption or levelling the playing-field.

The Government argued that it was a provision for the purpose of preventing the caps from being circumvented. The High Court responded, however, that implicit in the notion of circumvention is that the expenditure is derived from a single source, notwithstanding that it is made by two legally distinct bodies.[45] The Court regarded unions as separate organisations with their own separate funds and noted that the objectives of unions in electoral expenditure might not always be coincident with those of a political party. It considered that the criteria used to determine affiliation of bodies with a party did not 'reveal why or how they are to be treated as the same organisation for the purposes of expenditure on electoral communications'.[46] As there was no legitimate purpose to be served by the provision, it was held to be invalid.

Justice Keane noted that the law favoured entities, 'such as third-party campaigners, who may support a political party, but whose ties are not such as to make them affiliates under the rules of that party even though they may promulgate precisely the same political messages'. At the same time, it disfavoured the political communication of entities that fell within the definition of affiliated organisation. He concluded that to treat affiliated bodies differently from other

[45] *Unions NSW v New South Wales (No 1)* (2013) 252 CLR 530, [62] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[46] *Unions NSW v New South Wales (No 1)* (2013) 252 CLR 530, [63] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

third-party campaigners, who were not subject to aggregation provisions, is to 'distort the flow of political communication', rendering the law constitutionally invalid.[47]

In 2018, a general 'circumvention' provision was included in s 144 of the new *Electoral Funding Act.* It provides that a person who enters into or carries out a scheme (whether alone or with others) for the purpose of circumventing an expenditure cap is guilty of an offence. In addition to that general provision, a specific 'acting in concert' provision was enacted. It was directed at third-party campaigners that act under a formal or informal agreement in their electoral expenditure. It made it an offence for the third-party campaigners to incur electoral expenditure, when acting in concert, which exceeded a single cap. The effect was to aggregate the electoral expenditure of third-party campaigners when they act in concert.

This provision would seem to suffer from the same problems as the previous challenged provision. The third-party campaigners are separate entities with separate sources of funds and their own political objectives. The provision does not appear to be directed at preventing corruption. It would potentially have a distorting effect upon the free flow of political communication. The only argument that could be made to support it is that it would level the playing field to prevent a group of like-minded third-parties from joining in a well-funded campaign that drowned out other voices. Unlike the 2012 aggregation provision, it applied generally to third-parties and was not so pointedly directed at a political end.

The 2018 'acting in concert' provision was challenged in *Unions NSW (No 2).* As the cap on third-party campaigners was held to be invalid, most of the judges considered that it was unnecessary to determine the validity of the 'acting in concert' provision.[48] Justice Edelman, however, did so. He concluded that the only rational explanation for enacting both the cut in the third-party campaigner cap and the 'acting in concert' provision was that Parliament sought to quieten the voices of third-party campaigners relative to political parties and candidates. He considered that such a purpose 'cannot co-exist with the implied freedom of political communication'.[49]

While the other Justices had also rejected the privileging of political parties and candidates over third-party campaigners as a legitimate purpose, they had accepted that a differentiation could be justified if it was for the purpose of preventing well-funded voices from drowning out others and increasing the different sources of political communication. Hence, the 'acting in concert' provisions might have been able to be justified for this purpose – but only if there was sufficient evidence to show that this was a problem and that the provision was tailored to manage it by meeting the relevant test. Given the absence of evidence to support the cut in the expenditure cap for third-party campaigners, it is likely that the 'acting in concert' provision would have also been struck down for lack of justification, had its fate been determined.

Summary of relevant points

Points to keep in mind when considering any reform of third-party campaigner electoral expenditure caps and 'acting in concert' provisions include:

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[47] *Unions NSW v New South Wales (No 1)* (2013) 252 CLR 530, [167]-[168] (Keane J).

[48] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [54] (Kiefel CJ, Bell and Keane JJ), [68] (Gageler J); [119] (Nettle J); [120] (Gordon J).

[49] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [177] (Edelman J).

- Laws that limit electoral expenditure will necessarily burden the constitutional implication of freedom of political communication, so they *must* satisfy the relevant test to be able to survive any challenge.
- The law *must* be made for a 'legitimate purpose' which is compatible with the system of representative and responsible government, such as an anti-corruption purpose or levelling the playing field, so that well-resourced voices do not drown out others.
- Privileging political parties and candidates over third-party campaigners will *not* be considered a legitimate purpose. But it is legitimate that parties, which run candidates in all or most electorates, have a higher cap than minor parties or third-party campaigners who can limit their focus to particular issues or locations, due to the different costs involved in reasonably conveying their political message.
- The High Court sees the constitutional implication as supporting a greater variety of voices, including those of third-parties, over particular privileged voices. It stresses the equal participation of the people in the electoral system.
- Laws that seem to have been narrowly tailored so as to advantage or disadvantage a particular political party or cause will most likely be struck down as invalid.
- Laws that seek to prevent the well-resourced from drowning out other voices in the political debate and electoral campaigns may survive scrutiny, but they will need to support the free flow of political communication and not discriminate against particular political views or sectors of political participants.
- If a law is made which burdens the implied freedom of political communication, the onus is on the party defending the law (i.e. the government) to justify it.
- Justification of such a law will require evidence to satisfy the court that the law is made for a legitimate purpose that is compatible with the system of representative and responsible government and is proportionate.

Part IV – Practical matters

The need for sufficient evidence to justify the law

In *Unions NSW (No 2),* the failure to provide sufficient evidence to support the validity of the law resulted in it being struck down. Justice Gageler remarked that '[i]f a court cannot be satisfied of a fact the existence of which is necessary in law to provide a constitutional basis for impugned legislation,… the court has no option but to pronounce the legislation invalid.'[50]

A notable problem was that while there had been two inquiries into the issue – the Expert Panel and the Joint Standing Committee on Electoral Matters – both of them left open the need for further assessment, which did not occur.

The Expert Panel sought to cut the third-party campaigner cap so as to 'guard against third parties coming to dominate election campaigns', but without any evidence that this was

[50] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [95] (Gageler J).

actually occurring.[51] The Panel merely noted 'concern' expressed in its consultations that New South Wales could head down the United States route where Political Action Committees come to dominate election campaigns.[52] It accepted that the cap 'should not be set so low as to prevent third parties from having a genuine voice in debate' and considered that $500,000 was a 'sufficient amount that strikes the right balance between the rights of third parties and those of parties and candidates'. However, its reasoning was affected by the view that political parties and candidates should have a privileged position in election campaigns,[53] which the High Court rejected.

The Panel also set its $500,000 cap by reference to the experience of spending in the previous election, with an important qualification. It said:

> The Panel supports decreasing third party expenditure caps to half of the current amount to $500,000. This is still well above the approximately $400,000 that the NRMA, the highest spending third party, spent at the 2011 election. While we believe this to be a sufficient amount that strikes the right balance between the rights of third parties and those of parties and candidates, we only have data on third party spending from the last election. It would be appropriate to review the level of the third party spending caps after the 2015 election, if it becomes apparent that they are causing concern.[54]

The Joint Standing Committee on Electoral Matters considered the Expert Panel's recommendation in 2016. It 'acknowledged' the expenditure disclosures for the 2015 election campaign, in which three third-party campaigners (all union bodies) spent well over $500,000 and two others (both business bodies) came close to the $500,000 mark.[55] It then supported the reduction of the cap on electoral expenditure by third-party campaigners, but said:

> before implementing this change, the NSW Government should consider whether there is sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of $500,000.[56]

This was the missing link in the evidence. The NSW Government does not appear to have undertaken that assessment. The High Court noted in *Unions NSW (No 2)* that:

> No material has been placed before the Court which suggests that such an analysis was undertaken.[57]

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[51] There was, however, evidence that third-party campaigner advertising was increasing in frequency and amount during election campaigns: Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, p 108.

[52] Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, p 108.

[53] Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, p 109.

[54] Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, p 112.

[55] Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations* (June 2016), pp48-9.

[56] Joint Standing Committee on Electoral Matters, *Inquiry into the Final Report of the Expert Panel – Political Donations* (June 2016), p 49.

[57] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [26] (Kiefel CJ, Bell and Keane JJ).

Further, the Justices also pointed out that nothing in these reports explained the need for the reduction, such as any evidence that the level of expenditure was 'not effective for the purpose of preventing wealthy voices drowning out others'.[58]

Justice Nettle commented that it is 'as if Parliament simply went ahead and enacted the *Electoral Funding Act* without pausing to consider whether a cut of as much as 50 per cent was required.'[59] In the absence of such evidence, it was 'impossible to say whether or not the differential remains within the bounds of what might reasonably be required' and therefore impossible for the Court to be persuaded that the cut in the cap for third party campaigners was necessary.[60]

Hence, in order to ensure there is sufficient evidence to justify the existing law, or any change in the law, in any future court challenge, it would be necessary for a committee or other inquiry to seek, assess, and draw a reasoned conclusion from, evidence concerning:

- the minimum floor for a third-party campaigner to run a reasonable and effective campaign across the relevant jurisdiction (i.e. the State, in a general election or a particular electorate, in a by-election);
- the limits, if any, that are necessary to prevent a third-party campaigner from drowning out other voices in an election or by-election (which would include an assessment of the need for an 'acting in concert' provision and the circumstances in which it should be triggered); and
- the principled basis upon which the relativity between caps for major parties, minor parties and third-party campaigners should be set.

Any assessment of the level of a third-party electoral expenditure cap would need to take into account the cost, reach and effectiveness of different forms of political advertising, which changes over time. Previously, this would have focused primarily on the cost of advertisements on radio and television, which are priced by reference to factors such as the audience share of the program in which the ad is placed, the area reached and the time of day. Today, other methods of advertising would need to be addressed, such as online advertising on various platforms. Production costs would also need to be taken into account.

The length of the capped period is also relevant. The capped period prior to a general election is just under 6 months. Whereas the capped period for a by-election, which is the focus of this committee's inquiry, is a much shorter period of 3 to 4 weeks. In addition, the cost of advertising in a more limited area during a by-election will be cheaper than a general election.

In considering the cap for third-party campaigners in a by-election, one of the key questions will be whether $21,600 is too low. Even if it were considered acceptable for a candidate to be spending 12 times as much as a third-party campaigner during a by-election, it is possible that $21,600 would sink below the minimum floor necessary for a third-party campaigner to communicate its political message to voters in the electorate in a reasonably effective manner

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[58] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [20] (Kiefel CJ, Bell and Keane JJ). See also Gordon J at [152].
[59] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [117] (Nettle J).
[60] *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, [118] (Nettle J).

within the shortened time-period. This would be a question of fact that would need to be assessed on the basis of evidence.

Incentives that may arise from alterations in the regulation of third-party campaigners

While this Committee's inquiry is focused upon the narrow issues of the by-election cap for third-party campaigners and the 'acting in concert provision', it remains useful to keep in mind the broader incentives that differential third-party campaigner caps create.

As noted above, the original rationale for setting a third-party campaigner cap at the same level as that for minor parties was to remove any incentive for third-party campaigners to run candidates in the Legislative Council so as to gain a higher expenditure cap for their campaign, resulting in another 'table-cloth ballot paper'.[61] While there are constraints upon registration as a political party (eg registration at least 12 months before the election and the need to show at least 750 members and pay a registration fee), a third-party campaigner with long-term political interests might set up a front-party for this purpose, or might run a 'group' on the Legislative Council ballot paper, without any intention or expectation of winning a seat.

Another possibility is that it might encourage third-party campaigners to operate separately, rather than through peak bodies, or splinter into smaller separate groups so that they can each qualify for a separate cap. On the one hand, this might be a positive, to the extent that it increases the diversity of views. On the other hand, it might be a negative if it meant that their voices were completely drowned out.

A third possibility is that it could lead to chaotic elections if each club, community group or business was sending out differing political messages, making it even more difficult for parties and candidates to respond to the different issues raised and to reject any misinformation circulating. Given the pervasive reach of social media and the possibility that small players (who previously would have been drowned out) might produce a message that goes viral on social media platforms, expenditure alone is no longer a measure for potential influence.

The involvement of peak bodies in running third-party campaigns tends to moderate the message and ensure that there is compliance with the regulatory framework and laws, such as defamation law. Laws that prohibit third-party campaigners from acting in concert or that provide an incentive for third-party campaigners to operate separately rather than through a peak body, may have the perverse effect of proliferating political attacks, making it more costly for political parties and candidates to address and refute them.

Part V – Comparative expenditure caps for third-party campaigners[62]

Expenditure caps in the Australian States and Territories

Each of the States and Territories has a different, and often evolving, system that regulates campaign financing. Below is a summary of how each deals with third-party expenditure caps.

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[61] Panel of Experts on Political Donations in NSW, *Political Donations – Final Report* (2014) Vol 1, p 110.

[62] Note that while effort has been taken to update the information below, the overseas material is very complex and it should be taken as indicative only, as complete accuracy cannot be guaranteed.

Queensland: Registered third-party campaigners are subject to an expenditure cap of $90,7489 for a by-election.[63] For a general election, the cap for third-party campaigners is $1,043,088 (or $6000 if unregistered) and $90,749 per electoral district during the expenditure period prior to the election (from the first business day after the last Sunday in March prior to the election). This may be compared against the caps for political parties, which if they run in all seats, is $8,925,000.

South Australia: Expenditure caps apply in South Australia only to those political parties and candidates who opt-in to receiving public funding. If a third-party campaigner incurs more than $5,000 (as indexed) in political expenditure during the capped period or $10,000 during a financial year, it must lodge a return which includes disclosure of expenditure.[64] It is an offence to enter into an arrangement with a third-party to incur political expenditure on behalf of a candidate during the capped expenditure period for the purpose of avoiding an applicable expenditure cap.

Tasmania: While there are expenditure caps for candidates for the Legislative Council (and prohibitions on third-party campaigners incurring expenditure with a view to promoting candidates at Legislative Council elections), there are currently no expenditure caps generally for third-party campaigners. A Review on election finance in Tasmania in 2021 recommended the introduction of a disclosure regime first, to inform consideration at a later stage of whether caps on electoral expenditure by third parties may be appropriate.[65]

Victoria: There is no expenditure cap for third-party campaigners (or political parties or candidates), but there is a cap on donations. In addition, registered third-party campaigners must provide annual reports which include information on expenditure.[66]

Western Australia: There are currently no expenditure caps in Western Australia for political parties, candidates or third-party campaigners. However, there are reporting requirements for third-party campaigners who incur $500 or more in electoral expenditure during a disclosure period.[67] A Bill to introduce expenditure caps in 2020 failed to pass the Legislative Council. In that Bill, the proposed expenditure cap for general elections was $2,000,000 and for by-elections was $50,000.[68]

Australian Capital Territory: An indexed electoral expenditure cap applies, during the capped expenditure period, equally to non-party MLAs, associated entities, non-party candidate groupings and third-party campaigners. At the 2020 election the cap was $42,750

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[63] Queensland Electoral Commission – 'Expenditure Caps for Third Parties – 2021 Update': https://www.ecq.qld.gov.au/__data/assets/pdf_file/0023/12785/Fact-sheet-9-Expenditure-caps-for-third-parties-2021-Update.pdf.

[64] South Australia Electoral Commission, 'Reporting political expenditure (associated entities and third parties)': https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-for-state-elections/third-parties?view=article&id=256&catid=13.

[65] Tasmanian Government, *Electoral Act Review,* Final Report, February 2021, p 75: https://www.justice.tas.gov.au/__data/assets/pdf_file/0009/601398/210030-DPAC-Electoral-Act-Final-Report_16-Feb_wcag.pdf.

[66] *Electoral Act 2002* (Vic), s 217K.

[67] *Electoral Act 1907* (WA), s 175SD.

[68] *Electoral Amendment Bill 2020* (WA), cl 175SL: https://parliament.wa.gov.au/Parliament/Bills.nsf/EB9E3897F7784E6A48258591002F0E5E/$File/Bill%2B100-2.pdf.

(or $1,068,750 for parties that ran 5 candidates in each of the 5 electorates). If a third-party campaigner incurred more than $1000 in electoral expenditure during an expenditure period, then it was required to lodge an election expenditure return listing its expenditure. As ACT elections are held under proportional representation, there are re-counts when casual vacancies arise, rather than by-elections. Hence, there is no expenditure cap for by-elections.

Northern Territory: While electoral expenditure caps apply to candidates, parties and associated entities, they do not apply to third-party campaigners. Third-party campaigners are, however, required to register if they incur more than $1000 of electoral expenditure during the capped period and they must report their political expenditure.

United Kingdom

Expenditure limits have applied to third-party campaigners in the United Kingdom since 1918.[69] The amount that third parties could spend in support of a candidate was initially very low. In 1949 it was 10 shillings and by 1992 it was only £5. This was challenged by Mrs Bowman in the European Court of Human Rights in *Bowman v United Kingdom*.[70] The British Government argued that the law was justified as it prevented wealthy third parties from unduly influencing the campaign, ensured that candidates were not beholden to powerful interest groups and prevented the debate from being distorted away from general political issues to the single issues of particular campaigners. While the Court accepted that securing equality between candidates was a legitimate aim,[71] the legislation was regarded as disproportionate in its limitation on third parties. The £5 limit for third party expenditure was simply set too low for a third party to run any kind of effective campaign. The Court found that the expenditure cap breached Mrs Bowman's right to freedom of expression in the European Convention on Human Rights. As a consequence, expenditure caps for third-party campaigners in their support for candidates were increased to £500 and then later £700.

These limits only applied, however, to third-party spending in relation to a particular candidate in a particular constituency.[72] They did not extend to support for a political party. A further complicating factor was that there were laws that banned political advertisements on the electronic media. This meant that third-party campaigners could not spend money on the most expensive aspect of political campaigning, leaving them with little to fund. That has been affected by the rise of political advertising on social media platforms, which is not banned.

In 2000 the *Political Parties, Elections and Referendums Act 2000* (UK) introduced an additional regulatory regime for third parties. It required them to register if they engaged in campaign spending above a threshold. That threshold is £20,000 in England or £10,000 in Scotland, Wales or Northern Ireland and £10,000 in a referendum. Registered third-party campaigners are subject to disclosure obligations and limits on the donations they may accept. They are also subject to an expenditure limit in the 12 months preceding an election.

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[69] *Representation of the People 1918* (UK); and *Representation of the People Act 1983* (UK), s 75.

[70] (1998) 26 EHRR 1.

[71] *Bowman v United Kingdom* (1998) 26 EHRR 1, 17.

[72] *R v Tronoh Mines* (1952) 35 Cr App R 196. In this case, the spending was on an advertisement in a national newspaper about a political issue, with the aim of causing the election of any candidate other than a socialist candidate.

At the last UK general election in 2019, registered third party campaigners could spend up to £390,000[73] in a campaign across the United Kingdom, in comparison to up to £19 million for a party that ran candidates in all 650 constituencies.[74] The UK Government has since proposed to increase these limits to account for inflation.[75]

This regime exists in addition to, not in replacement of, the restrictions on spending to support a candidate in a particular constituency (which remains limited at £700), resulting in a rather confusing dual system[76] administered by different bodies.[77]

Further restrictions were introduced in 2014, in what is popularly known as the 'gagging Act',[78] applying separate limits to 'targeted spending' (which is directed at benefiting a particular party or its candidates).[79] Such spending must either be authorised by the party that is the beneficiary, in which case it falls under that party's cap, or it is subject to a lower limit of £39,000.[80] It also imposed a limit of £9,750 for expenditure supporting a political party in a particular constituency, to prevent sand-bagging marginal seats.

In a by-election, candidates for the UK Parliament can spend £100,000. If a third-party campaigner wishes to spend beyond the permitted £700 to support a candidate, then the third-party campaigner must obtain the candidate's permission in writing,[81] and the expenses will be regarded as falling within the candidate's expenditure limit.

In the United Kingdom there are also provisions that aggregate the expenditure of third-party campaigners if they engage in joint spending, which is where there is a common plan or arrangement between non-party campaigners.[82] These provisions have been controversial and are the subject of a proposed amendment in cl 28 of the *Elections Bill 2021* which would also cover third parties working jointly with registered political parties.[83] Labour has criticised it as an attack on the Labour Party and trades unions working together in election periods.[84]

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[73] It had previously been a much higher amount - £988,500 – but was reduce in 2014.

[74] Jacob Rowbottom, 'The Regulation of Third Party Campaigning in UK Elections', (2020) 91(4) *The Political Quarterly* 722, 724-5.

[75] UK House of Lords Library, Heather Evennett, 'Raising election spending limits in line with inflation', 11 February 2021: https://lordslibrary.parliament.uk/raising-election-spending-limits-in-line-with-inflation/.

[76] For a discussion of the difficulty this system causes for third-party campaigners and of proposals for reform, see: UK, The Committee on Standards in Public Life, *Regulating Election Finance,* July 2021, pp 84-98.

[77] The police enforce the laws concerning spending in support of candidates, known as 'local campaigns' while the Electoral Commission enforces the laws concerning campaigning for political parties or in relation to policies, known as 'general campaigns'.

[78] *Transparency of Lobbying, Non Party Campaigning and Trade Union Administration Act* 2014 (UK).

[79] *Transparency of Lobbying, Non-Party Campaigning and Trade Unions Administration Act 2014* (UK), s 30.

[80] £31,980 in England, £3,540 in Scotland, £2,400 in Wales and £1,080 in Northern Ireland.

[81] *Representation of the People Act 1983* (UK), s 75.

[82] *Political Parties, Elections and Referendums Act 2000* (UK), ss 94-94B. See further: UK Electoral Commission, 'Joint campaigning for non-party campaigners': https://www.electoralcommission.org.uk/sites/default/files/2020-12/Joint%20campaigning%20for%20non-party%20campaigners%20May%202021.pdf.

[83] See proposed s 94BA of the *Political Parties, Elections and Referendums Act 2000* (UK).

[84] Neil Johnston, *Elections Bill 2021-22: Progress of the Bill* (House of Commons Library, 5 April 2022) p 38.

New Zealand

Third-party campaigners (known in New Zealand as third party promoters) must register if they intend to spend over $13,600 (including GST) on election advertising during the regulated period prior to a general election (normally 2 to 3 months)[85] or a by-election (from the day after the notice of vacancy is published until polling day).

The most recent New Zealand election was in 2020, and the regulated expenditure period ran from 18 August to 16 October (i.e. 2 months). The expenditure limit for registered third-party campaigners was $338,000, with another $338,000 for each referendum.[86] The full cost of any joint advertisement was attributed to each third-party campaigner's expenditure cap. In contrast a registered political party had an expenditure cap of $1,199,000 plus $28,200 for each electorate contested by the party and a candidate had a cap of $28,200.[87]

By-elections are held where there is a vacancy in a seat of a member who was elected to represent an electoral district. The expenditure cap for a candidate at a by-election is $57,200.[88] There does not appear to be a separate expenditure cap for third-party campaigners during a by-election. This is because third-parties (and, indeed, political parties) may only promote a candidate if they have the candidate's written authorisation and any spending then counts towards the candidate's expenditure cap.

Registered third-party campaigners have to submit a return to the Electoral Commission if their expenditure exceeds $100,000.[89] The list of returns showed that most third-party campaigners spent money on one or both of the two controversial referendums (on cannabis legalisation and euthanasia).[90] Any person who enters into an agreement, arrangement or understanding with any other person for the purpose of circumventing the expenditure cap on third-party campaigners is guilty of a corrupt practice.[91]

Canada

After two attempts at banning or limiting third-party expenditure during election campaigns were struck down by the Courts,[92] the Canadian Parliament enacted a law in 2000 that imposed a cap of $150,000 on electoral expenditure by third-party campaigners, with no more than $3000 being able to be spent in an electoral district. Third-party campaigners also had to register if they spent more than $500 on electoral advertising during the campaign. This time, the legislation was upheld by the Canadian Supreme Court in *Harper v Canada.*[93]

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[85] The start of the regulation period may depend upon a public notice given by the Prime Minister, but the default is 3 months: *Electoral Act 1993* (NZ), s 3B.

[86] The amount was later increased in 2021 to $343,000 (*Electoral Act 1993* (NZ), s 206V).

[87] These amounts were increased in 2021 to $1,217, 000, $28,600 and $28,600 (*Electoral Act 1993* (NZ), s 206C and s 205C).

[88] *Electoral Act 1993* (NZ), s 205C.

[89] *Electoral Act 1993* (NZ), s 206ZC.

[90] New Zealand, Electoral Commission, '2020 General Election and Referendums – Registered promoter expenses for the 2020 General Election': https://elections.nz/democracy-in-nz/historical-events/2020-general-election-and-referendums/registered-promoter-expenses-for-the-2020-general-election/.

[91] *Electoral Act 1993* (NZ), s 206X.

[92] *National Citizens' Coalition v Canada* (1984) 11 DLR (4th) 481; and *Somerville v Canada* (1996) 136 DLR (4th) 205.

[93] *Harper v Canada* [2004] 1 SCR 827.

Like the High Court of Australia, the majority of the Canadian Supreme Court stressed the importance of voters being able to vote in an informed manner, which means that they must be 'able to hear all points of view'. This means there must be limitations on communication, or otherwise the voices of the affluent will drown out other voices.[94] The majority considered that unlimited spending by third parties can: (a) lead to the dominance of political discourse by the wealthy; (b) allow candidates and political parties to circumvent their own spending limits; (c) have an unfair effect on the outcome of an election; and (d) erode the confidence of the Canadian people in the fairness of the electoral system.[95]

The majority stressed that spending limits have to be 'carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters.'[96] Overly restrictive limits would undermine the ability of voters to be informed, and would therefore be unconstitutional. In this case, it was found that the limits allowed third parties to engage in 'modest, national, informational campaigns' and 'reasonable district informational campaigns', which was enough.[97]

The minority in *Harper v Canada* was concerned that the limits were too low, so that third parties could not effectively communicate their views on election issues to fellow citizens.[98] The majority noted that while the expenditure limits were set at a level lower than the limits that apply to candidates and parties, this was justified on the grounds that: candidates must have sufficient resources to respond to attacks from third parties; third parties have fewer expenses to meet than candidates; and third party expenditure is usually lower because it tends to focus on single issues.[99]

In Canada, third-party campaigners must register after having incurred more than $500 in expenditure on partisan advertising expenses, partisan activities and election survey expenses (which are 'regulated activities'). The expenditure limits for third-party campaigners are adjusted annually on 1 April. For the period between 1 April 2022 and 31 March 2023, a registered third-party campaigner may spend no more than $543,200 on regulated activities in relation to a general election, including no more than $4656 in a particular electoral district to promote or oppose a candidate, and $4,656 in a by-election.[100] These limits apply only during an election period, which starts on the day an election or by-election is called and ends when the polls close.

There are extensive provisions directed at preventing the caps from being circumvented in any manner, including where third-party campaigners split themselves into two or more parties, or collude with other third parties, political parties or candidates in relation to electoral expenditure.

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[94] *Harper v Canada* [2004] 1 SCR 827, [72] (Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ).
[95] *Harper v Canada* [2004] 1 SCR 827, [79].
[96] *Harper v Canada* [2004] 1 SCR 827, [73].
[97] *Harper v Canada* [2004] 1 SCR 827, [74].
[98] *Harper v Canada* [2004] 1 SCR 827, [9] (McLachlin CJ and Major J).
[99] *Harper v Canada* [2004] 1 SCR 827, at [116].
[100] Elections Canada, 'Third Party Expenses Limits': https://www.elections.ca/content.aspx?section=pol&document=index&dir=thi/limits&lang=e.