

**Submission
No 3**

**INQUIRY INTO THE IMPACT OF EXPENDITURE CAPS FOR LOCAL
GOVERNMENT ELECTION CAMPAIGNS**

Organisation: Local Government NSW

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Draft Submission to the Inquiry into the impact of expenditure caps for local government election campaigns

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW thanks the Joint Standing Committee on Electoral Matters (Committee) for the opportunity to provide a submission to the Inquiry into the impact of expenditure caps for local government election campaigns.

This submission is in draft form until endorsed by the LGNSW Board. Any revisions made by the Board at that time will be forwarded to the Committee in due course.

Introduction

Councils and communities deserve certainty, consistency and fairness in elections, and local government is committed to ensuring transparency and integrity in the electoral process. If mishandled, electoral funding, donations and expenditure have the potential for significant reputational damage to the local government sector.

The *Electoral Funding Act 2018* represents the first time that expenditure caps have been placed on the local government sector. Disappointingly, the Electoral Funding Act was rushed through the NSW Parliament without consultation with local government, and with no local government input into how the local government electoral expenditure caps could be formulated.

As a result, the Act establishes an inconsistent and inequitable electoral expenditure regime for local government, holds local government to a standard of compliance beyond that expected of State government, and appears to operate contrary to its own objectives. If not amended prior to the 2020 local government general elections, it is LGNSW's view that the Act's provisions will have an adverse effect on the manner in which local government election campaigns are able to be run.

As the peak body for local government in NSW, LGNSW has continued to express concern with the Act and the lack of consultation in its development and has called for the Act to be referred to Committee for inquiry.

LGNSW now welcomes the NSW Government's decision to refer this matter.

Terms of Reference

On 15 August 2018 the NSW Government referred to the Committee an Inquiry into the impact of expenditure caps for local government election campaigns, with the following Terms of Reference:

That the Committee inquire into and report on the impact of the expenditure caps for local government election campaigns on local government areas and wards with different populations, with particular reference to:

a) Whether the current expenditure caps are adequate;

b) Whether the number of enrolled electors in a ward or local government area is the best method to calculate expenditure caps; and

c) Whether the current divisions around the number of enrolled electors on which the expenditure cap is calculated are adequate

Legal advice

This submission is, in part, guided by legal advice on the Electoral Funding Act provided to LGNSW by McCullough Robertson Lawyers on 27 July 2018. The legal advice is referred to throughout this submission and is provided to the Committee as part of this submission at Attachment B.

Note on data used in this submission

Throughout this submission, per-elector estimates of electoral expenditure caps are determined using enrolled elector numbers sourced from the NSW Electoral Commission's local government resources database of spreadsheets dated 24 August 2018.¹ These spreadsheets represent the most up-to-date figures for enrolled electors, but do not include non-residential electors. However, at the 2016 and 2017 local government general elections, the number of non-residential electors in Local Government Areas (LGAs) was negligible (with most having fewer than 10 non-residential electors). The only exception is the City of Sydney which had 22,972 electors on the non-residential roll. As such, this submission uses data for both residential and non-residential electors for the City of Sydney only, sourcing this data from the official report of the 2016 general election.²

PART A – Whether current expenditure caps are adequate

The *Electoral Funding Act 2018* represents the first time that expenditure caps have been placed on the local government sector in NSW. The electoral expenditure caps for local government elections impose spending limits on candidates, parties and third-party campaigners during a prescribed period prior to, and including, election day.

Electoral expenditure is broadly defined in section 7 of the Act to mean:

...expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election, and which is expenditure of one of the following kinds:

(a) expenditure on advertisements in radio, television, the internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,

(b) expenditure on the production and distribution of election material,

¹ NSW Electoral Commission, *Council Area Statistics*, available at: <https://roll.elections.nsw.gov.au/lg/ex35> [accessed 7 September 2018]

² NSW Electoral Commission, *Supplementary Report on the 2016 Local Government Elections*, 2016, available at: http://www.elections.nsw.gov.au/data/assets/pdf_file/0005/242717/NSWEC_2016_LGE_Report_Supplementary_Report.pdf

- (c) expenditure on the internet, telecommunications, stationery and postage,*
- (d) expenditure incurred in employing staff engaged in election campaigns,*
- (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),*
- (f) expenditure on travel and travel accommodation for candidates and staff engaged in electoral campaigning,*
- (g) expenditure on research associated with election campaigns (other than in-house research),*
- (h) expenditure incurred in raising funds for an election or in auditing campaign accounts,*
- (i) expenditure of a kind prescribed by the regulations.*

The explanatory memorandum to the Electoral Funding Bill 2018 makes clear that the intended purpose of local government electoral expenditure caps is to create a regime similar to the existing electoral expenditure caps for State election regimes.

However, while NSW's 93 State electoral districts contain broadly similar elector numbers (approximately 56,000 electors per district) and are reviewed each electoral cycle to ensure that this balance is maintained, the 128 LGAs in NSW contain vastly divergent numbers of enrolled electors.

The most recent electoral roll records indicate that Brewarrina Shire Council has 925 enrolled electors while Central Coast Council has 251,690 enrolled electors. Indeed, 28 LGAs have fewer than 5000 enrolled electors, while 34 LGAs have more than 50,000 and 18 have more than 100,000 enrolled electors.³ This extreme variation in enrolled elector numbers for LGAs across NSW presents challenges in legislating for fair and equitable electoral expenditure caps.

As outlined below, it is LGNSW's view that the caps on electoral expenditure for local government, as currently set out in the Electoral Funding Act, are inadequate in terms of their formulation, consistency, operation and fairness. As currently drafted, they will result in inequitably divergent levels of electoral expenditure at the 2020 local government general elections.

It is also LGNSW's view that the local government electoral expenditure arrangements do not align with the objectives of the Electoral Funding Act as set out in section 3 and repeated in full as follows:

- (a) to establish a fair and transparent electoral funding, expenditure and disclosure scheme,*
- (b) to facilitate public awareness of political donations,*
- (c) to help prevent corruption and undue influence in the government of the State or in local government,*

³ NSW Electoral Commission, *Council Area Statistics*, 24 August 2018, available at: <https://roll.elections.nsw.gov.au/lq/ex35>

- (d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,
- (e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme.

The adequacy of separate elements of the expenditure caps is reviewed below.

Formulation of expenditure caps – candidates and parties

The caps that apply to local government candidates and parties are not fixed amounts under the Act. Rather, differing rates are applicable depending on a number of variables as set out in section 31 of the Act, including whether the candidate is endorsed by a party, is running as a 'grouped candidate', is also a mayoral candidate, whether the LGA is divided into wards and the number of electors that were enrolled in the LGA at the previous general election.

During the Second Reading Speech for the Act, the Hon. Anthony Roberts MP stated that the expenditure caps for local government would be struck at a lower rate than those applicable to State elections in order to reflect the lower number of voters, smaller geographic areas and 'traditionally much lower spending levels in local government elections'⁴.

In terms of voter numbers, it is worth noting that if the average State electoral division (with 56,000 electors) were an LGA, it would be smaller than almost a quarter of NSW LGAs.

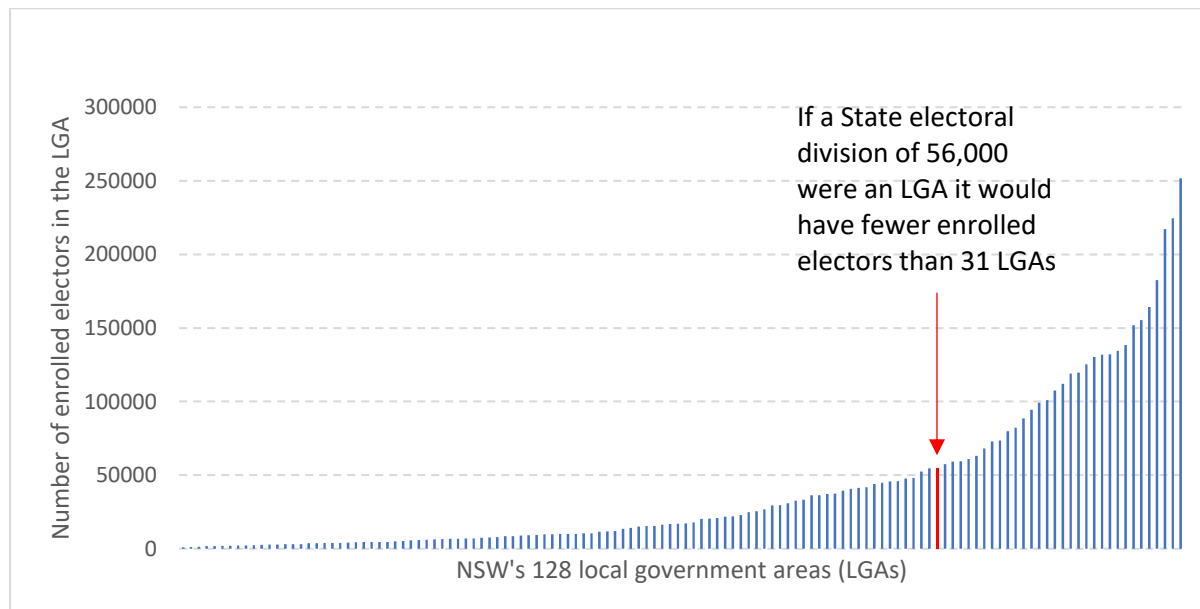


Chart: NSW local government areas by enrolled electors, contrasted with NSW State electoral division

⁴ The Hon. Anthony Roberts MP, *Hansard - Electoral Funding Bill 2018 Second Reading Speech*, 17 May 2018, available at:

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-101944'>

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By way of comparison, for the NSW Legislative Assembly, the Electoral Funding Act provides for a cap of \$184,200 in campaign expenditure. This is for an electorate of approximately 56,000 electors. In contrast, an ungrouped mayoral candidate standing for election in Liverpool City Council would be subject to an expenditure cap of \$30,000, for an LGA electorate of more than 134,000 electors.

Wards

Local Government Areas across NSW are either divided into wards which operate as separate electoral divisions for the purposes of electing councillors, or they are undivided and operate as a single electoral division for that local government area.

A council must not divide an area into wards or abolish a ward structure unless it has obtained approval to do so following referendum held in its local government area.⁵ Of NSW's 128 LGAs, 49 are currently divided, in varying arrangements of two, three, four or five separate wards in the LGA. One additional LGA, Shellharbour City Council, will be divided into wards for the 2020 local government election, following a successful referendum at the 2017 local government elections.

As the division of an LGA into wards is a matter for each LGA, there is no consistency across NSW as to when or where wards are established. For example, The Hills Shire Council with approximately 112,000 enrolled electors is divided into four wards, whereas Campbelltown City Council with around 108,000 is undivided. Similarly, Warren Shire with 2000 electors is divided into four wards, while Bourke Shire with 1800 electors is undivided. The Electoral Funding Act distinguishes wards from the broader LGA in determining local government party and candidate electoral expenditure caps, which has the effect of significantly increasing caps in LGAs that are divided into wards.

For example, for parties that endorse candidates in a local government general election, subsection 31(2) of the Act provides that the electoral expenditure cap for the parties is \$5000 per ward (in LGAs divided into wards and in which the party endorses a candidate in that ward) and \$5000 per LGA not divided into wards in which the party endorses a candidate in that LGA. The effect of this mechanism is outlined in the table below.

LGA division structure	Total party electoral expenditure cap for the LGA (s31(2))
Undivided LGA	\$5000
2 wards	\$10,000
3 wards	\$15,000
4 wards	\$20,000
5 wards	\$25,000

Table: Total party expenditure cap for LGAs divided into wards

The disparity this creates when applied to similarly sized regional, metropolitan and rural LGAs can be seen in the following examples (which assume that a party has endorsed candidates in all wards of an LGA).

⁵ *Local Government Act 1993*, s210

LGA	Enrolled electors	Wards	S31(2) party cap total for LGA	Cap represented as \$ per enrolled elector in LGA
<i>Regional</i>				
Orange	29,351	Undivided	\$5,000	\$0.17
Ballina	33,210	3	\$15,000	\$0.45
Dubbo	36,341	5	\$25,000	\$0.69
<i>Metro</i>				
Campbelltown	107,524	Undivided	\$5,000	\$0.05
Fairfield	130,354	3	\$15,000	\$0.12
Cumberland	125,311	5	\$25,000	\$0.20
<i>Rural</i>				
Bourke	1,802	Undivided	\$5,000	\$2.77
Carrathool	1,856	2	\$10,000	\$5.39
Warren	1,985	4	\$20,000	\$10.08

Table: Party expenditure caps for selected LGAs (s31(2))

As demonstrated above, regardless of the overall size of an LGA, the Electoral Funding Act sets higher party expenditure caps for those LGAs that are divided into wards.

The disparity is at its most extreme when comparing allowable party expenditure for Campbelltown and the City of Sydney (no wards, \$5000 party cap, i.e. less than five cents per enrolled elector) with allowable party expenditure for Warren Shire Council (four wards, \$20,000 party cap, i.e. more than \$10 per enrolled elector).

Evidently, the formulation of the caps results in inequitable outcomes even for LGAs with similar characteristics, including those with similar numbers of enrolled electors. This distortion is further compounded when candidate and group caps are considered.

Numbers of enrolled electors

The Electoral Funding Act applies a two-tiered formula to local government electoral expenditure caps for candidates, with higher expenditure caps for LGAs or wards that have more than 200,000 enrolled electors. These operate distinctly for general elections and by-elections, as outlined below.

In a general election

Of the 128 LGAs in NSW, only three (Blacktown, Canterbury-Bankstown and Central Coast) have more than 200,000 enrolled electors in the LGA. However, each of these three LGAs are divided into five wards and so do not trigger the higher tier cap for general elections, as none of the wards have more than 200,000 electors.

As a result, the delineation of 200,000 enrolled voters is currently ineffective for general elections as all candidates would be subject to the same, lower tier caps.

The candidate electoral expenditure caps also vary depending on whether a candidate is grouped or ungrouped, or is endorsed by a party or independent.

Similar to the disparities outlined above for party electoral expenditure, the candidate caps also skew expenditure in such a way that candidates in LGAs with wards and with lower numbers of enrolled electors have a much higher cap per enrolled elector than candidates in LGAs that are undivided and have higher numbers of enrolled electors. Examples of this disparity for regional, metropolitan and rural LGAs follow.

LGA	Enrolled electors	Wards	S31(5) cap total for party group candidates in all wards of LGA	Cap represented as \$ per enrolled elector in LGA
<i>Regional</i>				
Coffs Harbour	54,971	Undivided	\$30,000	\$0.55
Port Stephens	54,546	3	\$90,000	\$1.65
Maitland	59,270	4	\$120,000	\$2.02
<i>Metro</i>				
Campbelltown	107,524	Undivided	\$30,000	\$0.28
Hornsby	99,261	3	\$90,000	\$0.91
Bayside	100,966	5	\$150,000	\$1.49
<i>Rural</i>				
Hay	2,123	Undivided	\$30,000	\$14.13
Lockhart	2,328	3	\$90,000	\$38.66
Walcha	2,297	4	\$150,000	\$65.30

Table: Electoral expenditure caps in selected LGAs for candidate groups endorsed by a party (s31(5))

LGA	Enrolled electors	Wards	S31(4) independent candidate cap	Cap represented as \$ per enrolled elector in ward or in undivided LGA
Warren	1,985	4	\$25,000	\$50.38
Tenterfield	4,980	5	\$25,000	\$25.10
Clarence Valley	39,486	Undivided	\$25,000	\$0.63
Woollahra	40,726	4	\$25,000	\$2.46
Mid-Coast	73,495	Undivided	\$25,000	\$0.34
Ku-ring-gai	82,215	5	\$25,000	\$1.52
Campbelltown	107,524	Undivided	\$25,000	\$0.23
Northern Beaches	182,526	5	\$25,000	\$0.68

Table: Electoral expenditure caps in wards or undivided LGAs for independent ungrouped candidates (s31(4))

Whether independent, party-endorsed, grouped or ungrouped, the same two-tiered approach applies to local government electoral expenditure for all candidates in general elections. Common to all categories of candidate cap for general elections, there are no electorates where the higher (200,000+ electors) tier is in effect.

In a by-election

Electoral expenditure caps for local government by-elections have the same two-tiered cap with the threshold set at 200,000 electors. However, in contrast to general elections, the

applicable cap for by-election candidates is determined by the number of enrolled electors in the entire LGA, even if the by-election is being held in one ward only. By-election caps for candidates do not vary based on whether a candidate is or is not endorsed by a party.

As such, a candidate in a by-election in Blacktown, Canterbury-Bankstown or Central Coast LGAs (which have more than 200,000 electors) would be subject to an expenditure cap of \$60,000. In the 125 other LGAs in NSW, an expenditure cap of \$40,000 would apply.

Again, the table below demonstrates vastly divergent expenditure caps for LGAs with varying numbers of enrolled electors, when considered on a per elector basis.

LGA	Enrolled electors	Wards	S31(9) by-election candidate cap	Cap represented as \$ per enrolled elector in relevant ward or in undivided LGA
Warren	1,985	4	\$40,000	\$80.60
Cobar	3,121	Undivided	\$40,000	\$12.82
Inverell	11,861	Undivided	\$40,000	\$3.37
Canada Bay	57,529	Undivided	\$40,000	\$0.70
Blue Mountains	59,375	4	\$40,000	\$2.69
Campbelltown	107,524	Undivided	\$40,000	\$0.37
Penrith	138,349	3	\$40,000	\$0.87
Northern Beaches	182,526	5	\$40,000	\$1.10
Blacktown	217,167	5	\$60,000	\$1.38
Canterbury-Bankstown	224,474	5	\$60,000	\$1.34
Central Coast	251,690	5	\$60,000	\$1.19

Table: By-election expenditure caps in selected LGAs for a candidate in a single ward or undivided LGA (s31(9))

That a candidate's per-electoral expenditure in a Penrith by-election (\$0.87) amounts to more than double the figure in Campbelltown (\$0.37) is concerning. The disparity is even more stark when considering that a candidate in a by-election in Warren can spend 217 times more per elector than a candidate in a by-election in Campbelltown. Further, this arrangement does not take into consideration the greater costs that can be involved in campaigning in larger, metropolitan LGAs. (For State legislature elections, the overall higher expenditure caps provide for a level of spending better able to meet these higher costs).

Directly elected mayor

The Electoral Funding Act also sets out expenditure caps for candidates for the position of mayor, where the mayor is directly elected at local government elections⁶. The *Local Government Act 1993* provides that mayors can be elected either by electors, or by councillors from among their number. The method of election for mayor can only be changed following a successful referendum in the LGA.⁷

In NSW at present, there are 32 directly elected mayors. As a result of successful referenda at 2016 and 2017 local government elections, there will be 34 direct mayoral elections at the 2020 local government elections.

⁶ The note at section 31(1) of the Electoral Funding Act is clear that the Act does not apply to an election of a mayor by councillors.

⁷ *Local Government Act 1993*, sections 227-229

Electoral expenditure caps for mayoral elections have the same two-tiered cap with the threshold set at 200,000 electors. However, none of the 34 LGAs that will directly elect their mayor in 2020 have more than 200,000 enrolled electors. As such, the higher tier cap for mayoral elections is not, at present, triggered for any LGAs in NSW and mayoral candidate caps are the same for all LGAs that directly elect mayors, regardless of their number of enrolled electors. As demonstrated in the following chart, this means that mayoral candidates standing for election in LGAs with fewer numbers of electors are entitled to a substantially higher expenditure cap on a per-electoral basis. A mayoral candidate in Uralla can spend 33 times as much per-electoral than a mayoral candidate in Lake Macquarie.

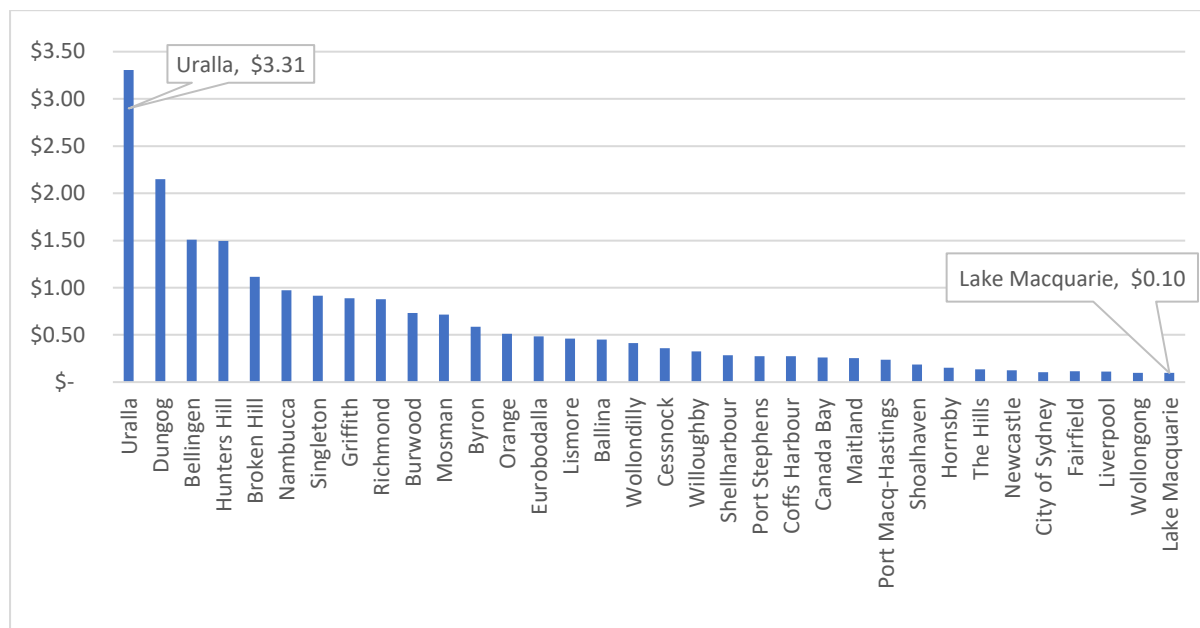


Chart: Grouped mayoral candidate expenditure cap (\$15,000) per-electoral for the 34 LGAs that will directly elect mayors in 2020 (s31(7))

A mayoral candidate who is part of a group standing for election is entitled to an expenditure cap of \$15,000 in all LGAs that directly elect mayors. This cap may allow for a reasonable level of electoral expenditure in smaller, rural LGAs. However, in larger LGAs – including in metropolitan Sydney – where it is traditionally more expensive to run campaigns, a cap of \$15,000 may be prohibitively low.

Further, the Local Government Act⁸ permits candidates for election as a councillor to stand for election as a mayor in the same election. Section 31(14) of the Electoral Funding Act provides that if a candidate is running for mayor and councillor at the same time, then the applicable electoral expenditure cap is that for mayor.

Electoral expenditure caps that are available to mayoral candidates are higher than caps that are applicable to party endorsed and independent candidates. As such, in the 34 LGAs that will directly elect mayors in 2020, this provision may have the unintended effect of creating an incentive for candidates to nominate for mayor in order to access the higher cap – when they have no other intention of running for mayor.

⁸ Section 283

This provision creates a loophole that has the potential to dilute the integrity of mayoral elections, and thus appears not to align with the Act’s objective to establish a fair expenditure scheme.

Recommendation 1: The formula for determining local government expenditure caps must be more fairly and consistently structured, in a manner that accounts for varying elector numbers in LGAs and other relevant characteristics of the LGA.

Recommendation 2: Expenditure caps for mayoral candidates should be structured in a way that does not create incentives for all candidates to stand for election as mayor in order to access a higher expenditure cap.

Formulation of expenditure caps – third-party campaigners

The Electoral Funding Act also imposes caps on local government electoral expenditure by third-party campaigners, such as local community and advocacy groups. For local government general elections, the applicable cap for a third-party campaigner is \$2,500 multiplied by the number of LGAs for which the third-party campaigner incurs electoral expenditure.⁹

The Act further limits third-party campaigner electoral expenditure to \$2,500 per ward or LGA where the expenditure is for advertising or material that targets the LGA or ward, or candidates in that LGA or ward.¹⁰ In effect, this prohibits a third-party campaigner from circumventing the cap by campaigning in additional LGAs for the purpose of increasing the overall cap and spending that increased amount in one LGA. For example, a third-party campaigner cannot nominally campaign in four LGAs to access a \$10,000 cap and then spend all or almost all of the \$10,000 targeting a single LGA. Rather, subsections 31(12) and (13) limit the expenditure targeting a single LGA to \$2,500.

The single tiered cap amount of \$2,500 again results in distorted expenditure caps for LGAs of varying population sizes, as demonstrated in the following table.

LGA	Enrolled electors	Third-party expenditure cap for expenditure targeting that LGA	Cap represented as \$ per enrolled elector in ward or in undivided LGA
Central Coast	251,690	\$2,500	<\$0.01
Blacktown	217,167	\$2,500	\$0.01
City of Sydney	141,369	\$2,500	\$0.02
Parramatta	132,134	\$2,500	\$0.02
Burwood	20,461	\$2,500	\$0.12
Hunters Hill	10,030	\$2,500	\$0.25
Narromine	4,600	\$2,500	\$0.54
Bogan	2,010	\$2,500	\$1.24
Brewarrina	925	\$2,500	\$2.70

Table: Third-party campaigner expenditure caps for selected LGAs (s31(10))

⁹ Subsection 31(10)

¹⁰ Subsections 31(12) and (13)

As demonstrated above, a third-party campaigner seeking to run a campaign targeting local issues in Central Coast Council LGA would be permitted electoral expenditure of less than one cent per elector. In fact in 34 LGAs across NSW, third-party campaigners are limited to expenditure of less than five cents per elector.

Indeed, in 118 of the 128 LGAs in NSW, a locally focused third-party campaigner could not pay postage costs for a single letter to each elector, to say nothing of printing and other costs that may be involved in running an effective campaign. The \$2,500 sum would be similarly inadequate for costs associated with campaign expenses including for advertising, telecommunications, digital campaigns and for production of other materials related to campaigning in the election.

The Panel of Experts, in its Final Report on Political Donations (Schott Report), asserted that: 'third-party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates'.¹¹ During the second reading speech for the Electoral Funding Bill, the Hon. Anthony Roberts MP stated that third-party campaigner electoral expenditure caps had been lowered in response to the Schott Report¹². While the Schott Report was referring to third-party campaigners in a State rather than local government context, the same principles should apply to local government elections.

Plainly, electoral expenditure caps amounting to less than two cents per elector do not allow third-party campaigners sufficient scope to run campaigns to influence voting. This low and inflexible third-party cap effectively stifles the voice of community groups that may campaign on local environmental, development or neighbourhood issues – particularly in LGAs with greater numbers of electors.

The legal advice sought by LGNSW further found that the provisions relating to third-party campaigners were complex, onerous and confusing, and that there was a real risk that the applicable caps would be misunderstood and unintentionally breached.¹³ Further, the legal advice found that restrictions on third-party campaigners may limit their ability to participate in the electoral process and so may impermissibly restrict the implied freedom of communication as set out in the Constitution.¹⁴

Recommendation 3: Electoral expenditure caps for third-party campaigners must be set at a level, or levels, that allow for genuine engagement with electors in LGAs of different sizes.

¹¹ NSW Department of Premier and Cabinet, Panel of Experts, *Political Donations Final Report – Volume 1 (Schott Report)*, December 2014, p.112, available at: https://www.dpc.nsw.gov.au/assets/media-news/95/attachments/611c3861d7/Volume_1_-_Final_Report.pdf

¹² The Hon. Anthony Roberts MP, *Hansard - Electoral Funding Bill 2018 Second Reading Speech*, 17 May 2018, available at: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-101944'>

¹³ At paragraphs 4.19 and 4.23

¹⁴ At paragraph 5.25

Acting in concert

The Electoral Funding Act also prohibits third-party campaigners from acting in concert with other persons to incur electoral expenditure that exceeds the applicable cap for the third-party campaigner for the election¹⁵. In practice, this prevents third-party campaigners from joining or assisting other campaigns once their maximum cap has been reached, but does not prohibit third-party campaigners from acting in concert when below the applicable cap.

The Act further provides that:

*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:*

- (a) having a particular party, elected member or candidate elected, or*
- (b) opposing the election of a particular party, elected member or candidate.¹⁶*

The legal advice sought by LGNSW found that the acting in concert provisions also affect how electoral expenditure is to be incurred and attributed for amounts that are below the cap. The advice noted that it is unclear how joint campaigns are to attribute expenditure, and that it is likely that such ambiguity will lead to third-party campaigners unintentionally exceeding the applicable caps and diminishing the integrity of the provision.¹⁷

Recommendation 4: Ambiguous third-party campaigner provisions – including restrictions on acting in concert – must be amended to provide clarity, simplify compliance and ensure that the provisions do not unreasonably deter third-party campaigners from participating in the electoral process.

Practical concerns with implementation and application of caps

As currently set out in the Electoral Funding Act, the local government electoral expenditure caps present difficulties in terms of their implementation and application.

Complexity of interpretation and reliance on non-legislated data sources

The explanatory memorandum of the Electoral Funding Bill makes clear that the intended purpose of local government electoral expenditure caps is to create a regime similar to the existing electoral expenditure caps for State election regimes. If this purpose is to be achieved then the local government electoral caps must be as accessible, clear and reasonable as they are for State elections. Unfortunately, this is not the case.

For NSW State elections, the electoral expenditure caps that apply for parties and candidates are clearly and simply set out in section 29 of the Electoral Funding Act. An independent candidate for election to, for example, the NSW Legislative Assembly does not

¹⁵ Section 35

¹⁶ Subsection 35(2)

¹⁷ At paragraph 4.25

need to consult any source of information other than the Act to know that their electoral expenditure cap is \$184,200.¹⁸

For local government general elections, candidates need to first consult the Electoral Funding Act to find the formula that applies to their category of candidate (i.e. whether they are independent or endorsed by a party, grouped or ungrouped, running for mayor and councillor at same time or not). These formulas provide tiered expenditure caps based on the ward structure and number of enrolled electors in the LGA at the previous general election. A candidate must then locate and consult unspecified external (non-legislated) data sources to determine the ward structure of their LGA and the number of enrolled electors at the previous general election, so that they can apply the relevant formula to their circumstances, and establish the electoral expenditure cap that applies.

Clearly, the electoral expenditure regime for local government candidates is significantly more complicated than the expenditure regime for NSW State candidates.

Inaccuracy of NSW Government data sources

As noted above, to determine their applicable electoral expenditure cap under the provisions of the Electoral Funding Act, candidates for election to local government elections require information on the ward structure of the LGA in which they are running, and the number of enrolled electors in their LGA or ward at the previous general election. Parties endorsing candidates in local government elections require information on the ward structure of the LGAs in which they endorse candidates for election.

The following paragraphs detail the difficulty involved in sourcing this required information.

Ward structure – data sources

Quite reasonably, a candidate or party might expect to find information on the ward structure of LGAs in the Local Government Directory on the Office of Local Government website¹⁹. Indeed, while the Local Government Directory does purport to include information on the ward structure of LGAs, in practice the ward structure information is at times incorrect or out of date.²⁰ As the Office of Local Government's Local Government Directory is not a reliable source for this information, a candidate or party that relied on it to calculate electoral expenditure caps may end up inadvertently breaching the Electoral Funding Act's caps.

The NSW Electoral Commission publishes three sets of information that may be useful in determining the ward structure of an LGA for an upcoming election.

Firstly, the NSW Electoral Commission publishes two official reports after each local government general election: a 'main report' containing an overall summary of all LGA elections and a 'supplementary report' containing individual reports for each LGA's election

¹⁸ Or such other amount as adjusted for inflation in future years, as provided for by Schedule 1 of the Act.

¹⁹ Office of Local Government, *Local Government Directory*, available at: <https://www.olg.nsw.gov.au/local-government-directory>

²⁰ For example, as at 7 September 2018 both Central Coast and Canterbury-Bankstown Councils are shown as being undivided, when in fact they both have five wards.

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(together, the 'post-election reports').²¹ Only the supplementary report contains details of the ward structure for each LGA at the time of the election. However, as noted earlier in this submission, the ward structure of an LGA can be changed following a referendum. The outcomes of any referenda held in LGAs are published in the main report. To determine the current ward structure of an LGA from the post-election reports, both the main and supplementary reports must be read together.

Information availability is also complicated by the fact that section 296 of the *Local Government Act 1993* permits councils to conduct their own elections and in 2016 five councils chose to do so, as did one further council in 2017. These elections were not conducted by the NSW Electoral Commission. For these LGAs, ward data is not available in the NSW Electoral Commission's post-election reports.

Secondly, the NSW Electoral Commission also publishes past results of elections through its Virtual Tally Room, sorted by LGA.²² By way of example, the page for City of Shellharbour's 2017 general election states that 'City of Shellharbour is an undivided local government area and has no wards' and also notes that two questions were put to referendum. Clicking through to get to the page on referenda results, it emerges that a referendum on dividing Shellharbour into wards was successfully passed, and so at the 2020 local government elections Shellharbour will be divided into wards.

Thirdly, the NSW Electoral Commission also provides a series of local government resources, including a database of spreadsheets containing electoral roll statistics for all LGAs, for a selection of approximately 12 dates in each year dating back to 2007.²³ These represent the date of extraction of the information from the Australian Electoral Commission's electoral roll. Contained within the spreadsheet for each LGA is the ward structure of that LGA at the time of publication of the spreadsheet.

Finally, each of the 128 LGAs in NSW have their own websites with varying formats, and these websites contain information on the ward structure of those LGAs. While this information is current and correct, it is contradicted by outdated or incorrect ward structure information hosted on NSW Government websites (as detailed above) and so may lead to further confusion.

Number of enrolled electors at previous general election – data sources

While the Office of Local Government's Local Government Directory contains LGA population figures, it does not contain numbers of enrolled electors at the previous general election. Individual council websites similarly do not contain information on the numbers of enrolled electors at previous general elections.

Again, the NSW Electoral Commission publishes three sets of information that contain numbers of enrolled electors in each LGA.

²¹ For 2017 post-election reports, see http://www.office.elections.nsw.gov.au/about_us/plans_and_reports/our_reports/local_government_elections_2017_reports

²² For 2017 results, see <http://pastvtr.elections.nsw.gov.au/LGE2017/results/index.htm>

²³ NSW Electoral Commission, *Council Area Statistics*, accessed 4 September 2018, available at: <https://roll.elections.nsw.gov.au/lg/ex35>.

Firstly, the NSW Electoral Commission's post-election reports contain the number of enrolled electors in each LGA (including both the residential roll and the non-residential roll), but these reports do not provide the number of enrolled electors at the ward level. Practically speaking, this is not of consequence at the current time as the Electoral Funding Act's threshold for determining electoral expenditure tiers is set at 200,000 electors, and there are no wards with more than 200,000 electors. Further, as noted above the post-election reports do not contain data for the LGAs that conducted their own elections.

Secondly, the NSW Electoral Commission website's Virtual Tally Room publishes numbers of enrolled electors at previous general elections, including per ward. Unfortunately, this information is at times incorrect and contradicts figures from the official post-election reports. For example, the Virtual Tally Room page for Ballina Shire Council states that the number of enrolled electors at the 2016 local government election was 64,834²⁴, while the correct number of enrolled electors at that time, 32,417, is shown in the post-election report. More concerning, the Virtual Tally Room page for Liverpool City Council states that the number of enrolled electors for the 2016 election was 261,072²⁵, which is double the correct number of 130,536, as shown in the post-election report. The Liverpool City Council LGA directly elects its mayor. If a mayoral candidate were to rely on the NSW Electoral Commission's incorrect higher enrolled elector figure – which is above the 200,000 elector threshold – the candidate may unwittingly exceed the electoral expenditure cap – and breach the provisions of the Electoral Funding Act.

Further, while the Virtual Tally Room provides *voting results* for councils that have conducted their own elections, it does not provide numbers of *enrolled electors* for these LGAs.

The third source of NSW Electoral Commission data on numbers of enrolled electors is contained in the local government resources database of spreadsheets²⁶. However, for neither the 2016 nor the 2017 local government general elections is there a spreadsheet for the exact dates of the general elections, nor for the 'closing date' for the electoral roll which is 40 days earlier.²⁷ Furthermore, these spreadsheets only contain information on residential roll electors, and not the non-residential roll electors who must also be included in the count of enrolled electors. While a candidate could seek to estimate the number of enrolled electors based on spreadsheet data from dates close to the election date, this poses problems where the addition of one enrolled elector may mean crossing the threshold to a higher tier electoral cap, creating an expenditure cap many thousands of dollars higher.

In fact, if a candidate is seeking to stand in one of the six LGAs, which at the previous (2016 or 2017) general elections conducted their own elections, it is not clear where the candidate can obtain accurate, publicly available data on enrolled elector numbers for their LGA. Thus, it is not clear what official data such a candidate could rely on to determine their applicable expenditure cap.

²⁴ NSW Electoral Commission, *Local Government Elections 2016 – Ballina Shire Council*, available at: <http://www.pastvtr.elections.nsw.gov.au/LGE2016/ballina-shire-council/index.htm> [Accessed 7 September 2018]

²⁵ NSW Electoral Commission, *Local Government Elections 2016 – Liverpool City Council*, available at: <http://www.pastvtr.elections.nsw.gov.au/LGE2016/liverpool-city-council/index.htm>, [accessed 7 September 2018]

²⁶ NSW Electoral Commission, *Council Area Statistics*, accessed 4 September 2018, available at: <https://roll.elections.nsw.gov.au/lg/ex35>

²⁷ The Local Government (General) Regulation 2005 (clause 278) provides that the closing date in relation to an election or poll is the date of the fortieth day preceding the day for the election or poll. However, electors may continue to enrol up to and including Election Day.

At this point, it bears reiterating the ease with which candidates for the NSW Legislative Assembly can determine their electoral expenditure cap, by reference solely to the Electoral Funding Act:

- 29(6) *For a State general election, the applicable cap for a candidate endorsed by a party for election to the Assembly is \$122,900.*
- 29(7) *For a State general election, the applicable cap for a candidate not endorsed by any party for election to the Assembly is \$184,200.*

Evidently, the information needed to understand the caps that apply to NSW State legislature candidates is readily available and clearly set out within the Electoral Funding Act itself.

In contrast, local government expenditure caps are far more complex, and require a reliance on external NSW Government websites and information, which may be confusing, inaccessible, unavailable or, as demonstrated above, contradictory and incorrect.

Recommendation 5: Local government electoral expenditure caps must be clearly and completely provided for within the Electoral Funding Act (whether within the body of the Act, a Schedule to the Act or in a Regulation) and should not require calculation based on external data sources.

Impact of expenditure caps on local government elections

Democracy, integrity and fairness

The legal advice sought by LGNSW has highlighted and summarised a number of concerns with the adequacy of the Act's local government electoral expenditure caps, including that:

- The Act drastically skews electoral expenditure in LGAs and does not establish a fair electoral expenditure regime, as its formula:
 - Fails to account for varying sizes of each LGA;
 - Burdens candidates in larger electorates by restricting the funds available to them in pursuing their campaigns, particularly in comparison to elections in smaller LGAs;
 - Does not provide equal expenditure that is proportionate to the electors or LGAs, even in electorates in similar areas and of similar sizes;
 - Allocates significantly higher per capita spending per enrolled electors in smaller LGAs than in larger LGAs;
 - Does not allow adequate funding for campaigns in more populated LGAs and where it is typically more expensive to run campaigns;
 - Does not reasonably reflect the expenses of running a campaign in larger metropolitan LGAs;
 - Creates the potential for prohibitively high spending expectations for independent candidates in smaller electorates and may result in a situation where independent candidates cannot afford to participate in the electoral process.

- The Act incentivises and creates a loophole for candidates to stand for election as mayor in order to access a higher electoral expenditure cap, diluting the integrity of mayoral elections.
- Third-party campaigner provisions create unfair expenditure schemes where funds are insufficient to effectively participate in the electoral process, and may make joint campaigns between third-party campaigners unfeasible.²⁸

The legal advice concludes that:

*the provisions of the Act discussed in this advice do not further the objectives identified in section 3 of the Act and it has failed to establish a regime that is fair and equitable to all registered voters across New South Wales. In our opinion, the provisions of the Act are therefore contrary to the objectives set out in section 3 of the Act.*²⁹

This submission has also detailed examples of the inconsistent, unclear and inequitable formulation and operation of the Electoral Funding Act's caps on local government electoral expenditure. The distorted expenditure arrangements mean that in some LGAs political communication between candidates, parties, third-party campaigners and electors will be more available than in others. In LGAs with higher expenditure caps on a per-electoral basis, voters will have more information at hand to assist them in making decisions while exercising their democratic right, while electors in smaller neighbouring LGAs may have less information.

This submission further provides examples of the confusing, incorrect and contradictory NSW Government data on which candidates and parties are seemingly expected to rely to determine applicable expenditure caps. If a candidate were to rely on flawed NSW Government information in good faith, the candidate may unintentionally breach expenditure caps. In these circumstances the candidate's lack of awareness of the breach may be a reasonable defence to prosecution.³⁰ Nonetheless, the democratic process is compromised where some candidates for election incorrectly operate under a higher cap than their opponents based on overly complicated legislation and NSW Government data that is inaccurate or inaccessible.

Participation

This submission has detailed practical concerns with the implementation and application of caps, noting the complexity and inaccessibility of determining electoral expenditure caps for parties, candidates and third-party campaigners in local government elections.

The NSW Parliamentary Counsel's Office drafting practice document on plain language states that:

Legislation should be able to be understood with a minimum of effort by its users. To this end, drafters should always try to draft with the needs of intended users of legislation in mind. This is the first principle of effective plain legal drafting. Further principles relate more specifically to effective communication through logical and

²⁸ At paragraph 6.3

²⁹ At paragraph 6.4

³⁰ *Electoral Funding Act 2018*, subsection 145(1)

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*practical organisation of material, simple sentence construction, careful choice of words and practical physical design.*³¹

While the case could be made that the Electoral Funding Act meets these drafting standards for NSW State legislature expenditure caps, this is certainly not the case for local government electoral expenditure caps.

The NSW Government, through the Office of Local Government, has recognised that some demographics are under-represented on councils in NSW. These include women, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people with a disability and young people. In response, the Office of Local Government has developed a range of resources aimed at increasing the representation of diverse communities.³²

LGNSW and the Office of Local Government have also co-developed the Collaborate NSW resource, to support the inclusion of Aboriginal communities in council decision-making, service development and delivery. Collaborate NSW aims to encourage more Aboriginal and Torres Strait Islanders to stand for council election.³³

Unfortunately, despite the earlier work of LGNSW and the Office of Local Government in encouraging democratic participation, the complexity and inaccessibility involved in determining local government electoral expenditure caps under the Electoral Funding Act is likely to have the opposite effect – deterring potential candidates from standing for election.

As noted above, the inequitable caps may also result in a situation where prohibitively high spending expectations mean that independent candidates cannot afford to effectively campaign where they are significantly outspent by better-resourced candidates, especially in smaller electorates with higher caps on a per-electoral basis.

It is notable that while councils are the sphere of government closest to the community, the electoral expenditure regime for local government is now the most complex to decipher and with which to comply. Further to this, local government is the only sphere of government without access to public funding of election campaigns.

To encourage participation and promote compliance, local government electoral expenditure caps should be clearly provided for in the Act – as they are for state government elections. Local government candidates should not be required to pull together extraneous pieces of information from inconsistent, unclear, inaccessible and – at times – incorrect sources to determine the applicable expenditure caps.

Recommendation 6: The local government electoral expenditure cap regime should be accessible to its potential users to encourage broad electoral participation in the sphere of government closest to the community.

³¹ NSW Parliamentary Counsel's Office, *Drafting practice document 2 – Plain language policy*, May 2017, available at: https://www.legislation.nsw.gov.au/dp2-pco_plain_language_policy.pdf

³² NSW Office of Local Government, *Become a councillor – Stand for your community guides*, available at: <https://www.olg.nsw.gov.au/public/my-local-council/become-a-councillor> [accessed 7 September 2018].

³³ Collaborate NSW, *Stand for your community*, available at: <http://collaboratensw.org/for-communities/stand-for-your-community/> [accessed 7 September 2018]

PART B – Whether the number of enrolled electors in a ward or local government area is the best method to calculate expenditure caps

There is clearly a link between the number of electors in an LGA and the amount of funding required to support advertising and to effectively campaign in that LGA. Yet the Electoral Funding Act creates a situation where the electoral expenditure permitted per-electoral is substantially higher in a number of smaller LGAs than in more populous LGAs, as outlined throughout this submission.

If the number of enrolled electors were more effectively worked into the calculation of local government expenditure caps, or if there were a maximum or minimum per-electoral cap, it is likely that the expenditure caps would establish a fairer and more reasonable electoral expenditure regime.

The Electoral Funding Act relies on a precise threshold of ‘200,000 enrolled electors at the previous general election’ in its formula for determining local government expenditure caps. The enrolment of just one further elector could result in an expenditure cap that is thousands of dollars greater at the next election.

Precise thresholds require precise data from precise points in time. This submission highlights the current challenges in obtaining such precise enrolled elector data to enable calculation of expenditure caps. Should additional thresholds be introduced to provide for more responsive caps that genuinely separate LGAs and wards into different tiers, the precision of this data will become all the more important.

The electoral roll for each LGA or ward is a composite roll, made up of the residential roll, the non-residential roll and the roll of occupiers and rate paying lessees. While the NSW Electoral Commission prepares the residential roll for each LGA or ward, it is the responsibility of each council’s general manager to prepare the latter two rolls.³⁴

The Local Government Act requires wards in the same LGA to have similar numbers of enrolled electors – within 10 per cent of every other ward in the LGA.³⁵ Relying solely on the number of enrolled electors in a ward to determine expenditure caps could plausibly result in an inequitable scenario where one ward was marginally above a threshold, resulting in substantially higher expenditure caps for candidates in that ward at the next general election. Meanwhile other wards within the same LGA may be marginally below the threshold, and so candidates for these wards would be restricted to a lower expenditure cap. This scenario suggests while elector numbers may be part of the method for determining expenditure caps, a more nuanced approach that also considers other elements may be preferable.

Conversely, the Electoral Funding Act determines third-party campaigner expenditure caps for local government without any reference to the number of enrolled electors in an LGA, resulting in the inequitable arrangements outlined earlier in this submission. Introducing the use of enrolled elector numbers in determining third-party campaigner caps may result in more reasonable and equitable outcomes.

³⁴ *Local Government Act 1993*, sections 298-301

³⁵ *Local Government Act 1993*, section 211

Ultimately, it is LGNSW's view that the Committee should consider a range of variables in determining the most appropriate method for calculating local government expenditure caps. Further, the NSW Government must engage in genuine consultation of proposed expenditure cap models, to avoid inconsistencies and inequitable outcomes.

Recommendation 7: The Committee (or NSW Government) should consider the following variables in determining the most appropriate method for local government expenditure caps for parties, candidates and third-party campaigners:

- (a) The geographic size of the council
- (b) The number of electors within the council
- (c) Whether or not the council is divided into wards
- (d) Whether the mayor of the council is directly elected
- (e) Whether the council is a metropolitan or non-metropolitan council
- (f) The number of councillors
- (g) The different categories of council identified by the Local Government Remuneration Tribunal³⁶ (note that these categories take into account some of the elements above)
- (h) Whether there should be minimum and maximum caps for wards or LGAs on a per-electors basis
- (i) Whether candidates are endorsed by a registered political party contesting an election in one LGA or in multiple LGAs
- (j) Whether candidates are nominating as a group or as individuals
- (k) Whether candidates have nominated for election as a mayor and as a councillor
- (l) Whether candidates should be subject to a single cap, or there should be separate caps for groups and individual candidates.

Recommendation 8: That the Committee (or NSW Government) model proposals for all 128 councils, including outlining what each of the proposed expenditure caps would amount to on a per-electors basis, to avoid extreme or inequitable outcomes.

Recommendation 9: That there be a reasonable period of public exhibition and consultation of the proposals, to allow stakeholders the opportunity to provide feedback and highlight any further irregularities.

Recommendation 10: That amendments be made to the Electoral Funding Act well in advance of the 2020 local government elections, to allow for certainty, consistency and fair and equitable elections.

³⁶ The Local Government Remuneration Tribunal (LGRT) reports to the Minister for Local Government by 1 May each year as to its determination of categories of councils and the maximum and minimum amounts of fees to be paid to mayors, councillors, and chairpersons and members of county councils. In doing so, the LGRT reviews the criteria that apply to the categories of councils and the allocation of councils into those categories. The LGRT stated in its most recent report that *'the categories differentiate councils on the basis of their geographic location with councils grouped as either metropolitan or non-metropolitan. With the exception of Principal CBD and Major CBD, population is the predominant criterion to determine categorisation. Other common features of councils within those categories are also broadly described. These criteria have relevance when population alone does not adequately reflect the status of one council compared to others with similar characteristics. In some instances the additional criteria will be sufficient enough to warrant the categorisation of a council into a group with a higher indicative population range.'* Local Government Remuneration Tribunal, *Annual Report and Determination*, 17 April 2018, available at: <https://www.remtribunals.nsw.gov.au/ArticleDocuments/210/2018-Annual%20Determination-LGRT.pdf.aspx>

PART C – Whether the current divisions around the number of enrolled electors on which the expenditure cap is calculated are adequate

As outlined in this submission, although the Electoral Funding Act purports to differentiate local government electoral expenditure caps based on a threshold of 200,000 enrolled electors, in reality this threshold is almost meaningless as there are no wards, and no undivided LGAs, with more than 200,000 electors. As such, all wards and all LGAs in NSW sit within the same, lower tier of local government electoral expenditure – regardless of their variance in size and structure. Further, none of the three LGAs with greater than 200,000 electors directly elect their mayors, and so the only time the higher tier would be triggered is for a by-election in Blacktown, Canterbury-Bankstown and Central Coast.

Consideration of the recommendations to improve electoral expenditure caps, as set out in this submission, must necessarily take into account measures to improve the divisions on which expenditure caps are calculated in the Electoral Funding Act.

Recommendation 11: The current divisions around the number of enrolled electors should be reconsidered in accordance with recommendations made throughout this submission.

Conclusion

Local government supports a move to clearer, cleaner elections at all spheres of government, but the Electoral Funding Act fails to provide this. As outlined throughout this submission, it is clear that the Act requires sensible amendment well in advance of the 2020 local government elections to avoid adverse impacts on democracy, fairness and the manner in which campaigns are able to be run.

LGNSW welcomes the Committee's consideration of the recommendations made in this submission and would be pleased to provide further information or clarification to the Committee as required.

For further information on this submission please contact [REDACTED]
or at [REDACTED]

Recommendations summary

Attachment A

Recommendation 1: The formula for determining local government expenditure caps must be more fairly and consistently structured, in a manner that accounts for varying elector numbers in LGAs and other relevant characteristics of the LGA.

Recommendation 2: Expenditure caps for mayoral candidates should be structured in a way that does not create incentives for all candidates to stand for election as mayor in order to access a higher expenditure cap.

Recommendation 3: Electoral expenditure caps for third-party campaigners must be set at a level, or levels, that allow for genuine engagement with electors in LGAs of different sizes.

Recommendation 4: Ambiguous third-party campaigner provisions – including restrictions on acting in concert – must be amended to provide clarity, simplify compliance and ensure that the provisions do not unreasonably deter third-party campaigners from participating in the electoral process.

Recommendation 5: Local government electoral expenditure caps must be clearly and completely provided for within the Electoral Funding Act (whether within the body of the Act, a Schedule to the Act or in a Regulation) and should not require calculation based on external data sources.

Recommendation 6: The local government electoral expenditure cap regime should be accessible to its potential users to encourage broad electoral participation in the sphere of government closest to the community.

Recommendation 7: The Committee (or NSW Government) should consider the following variables in determining the most appropriate method for local government expenditure caps for parties, candidates and third-party campaigners:

- (a) The geographic size of the council
- (b) The number of electors within the council
- (c) Whether or not the council is divided into wards
- (d) Whether the mayor of the council is directly elected
- (e) Whether the council is a metropolitan or non-metropolitan council
- (f) The number of councillors
- (g) The different categories of council identified by the Local Government Remuneration Tribunal (note that these categories take into account some of the elements above)
- (h) Whether there should be minimum and maximum caps for wards or LGAs on a per-electoral basis
- (i) Whether candidates are endorsed by a registered political party contesting an election in one LGA or in multiple LGAs
- (j) Whether candidates are nominating as a group or as individuals
- (k) Whether candidates have nominated for election as a mayor and as a councillor
- (l) Whether candidates should be subject to a single cap, or there should be separate caps for groups and individual candidates.

Recommendation 8: That the Committee (or NSW Government) model proposals for all 128 councils, including outlining what each of the proposed expenditure caps would amount to on a per-elector basis, to avoid extreme or inequitable outcomes.

Recommendation 9: That there be a reasonable period of public exhibition and consultation of the proposals, to allow stakeholders the opportunity to provide feedback and highlight any further irregularities.

Recommendation 10: That amendments be made to the Electoral Funding Act well in advance of the 2020 local government elections, to allow for certainty, consistency and fair and equitable elections.

Recommendation 11: The current divisions around the number of enrolled electors should be reconsidered in accordance with recommendations made throughout this submission.

Legal opinion – Electoral Funding Act 2018 (NSW)

Review of the Electoral Funding Act 2018 (NSW)

Dated: 17 July 2018

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Legal opinion

Electoral Funding Act 2018 (NSW)

Background

1 Electoral Funding Act 2018 (NSW)

- 1.1 The *Electoral Funding Act 2018* (NSW) (**the Act**) commenced on 1 July 2018, repealing and replacing the former *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (**EFED Act**). The Act implements a new regulatory regime for State and Local Government Elections, introducing wide ranging reforms to the regulation of electoral expenditure, third-party funding and disclosure obligations in relation to political donations in both State and Local Government Elections. The Act was drafted in order to implement a range of reforms that were recommended by an independent panel of experts (**the Schott Report**) and by the Parliament's Joint Standing Committee on Electoral Matters.
- 1.2 In particular, the imposition of electoral expenditure caps in Local Government Elections is new and these regulations have not previously applied to Local Government Elections. The Act introduces restrictions for local government elections for the first time, with a view to operating in the same way as caps for State election expenditure.
- 1.3 We are instructed that there is a level of concern regarding the operation of certain provisions of the Act, in particular those relating to Local Government electoral expenditure caps and new provisions relating to third-party campaigners.

Instructions

2 Review of the Act

- 2.1 We are instructed to undertake a review of the Act in relation to the operation, implementation and consequences of the reforms brought in by the Act. Specifically, we have been asked to:
 - (a) advise on the flaws or unintended consequences of the formula for determining Local Government electoral expenditure in the Act;
 - (b) advise on the expenditure caps for third-party campaigners for both State and Local Government elections and what impact they may have;
 - (c) advise on the constitutionality of the provisions imposing electoral expenditure caps on third-party campaigners in both State and Local Government elections;
 - (d) advise on the restrictions imposed on third-party campaigners in relation to acting "in concert" with others;
 - (e) advise on the applicable penalties for breaching the electoral expenditure caps prescribed under the Act;

- (f) advise on whether the regulations on electoral expenditure and third-party campaigning meet the objectives of the Act as set out in section 3 of the Act; and
- (g) advise on the potential time frame and timetabling issues in relation to the New South Wales Parliament reviewing and amending the Act.

2.2 We set out our advice in the paragraphs that follow.

Advice

3 Local Government Electoral Expenditure Caps

- 3.1 Electoral expenditure in Local Government Elections has not previously been subject to any kind of legislated expenditure cap. In the Bill's Explanatory Memorandum, the intended purpose for their introductions is stated as creating a regime similar to the existing electoral expenditure caps in State election campaigns.
- 3.2 The new electoral expenditure caps appear to have been legislated in response to the recommendations contained in the *Final Report of the Panel of Experts on Political Donations* dated December 2014 (**Expert Panel Report**) and incorporate amendments first circulated in the *Local Government and Elections Legislation Amendment (Integrity) Act 2016*. In that Bill's Second Reading Speech, the Minister for Local Government The Honourable Paul Toole MLA emphasised the importance of decisions made by local councils, stating that:

"Local councillors, through the decisions they make on behalf of the local communities, exert significant influence on the day-to-day lives of the people of New South Wales...[the measures are] designed to restore community confidence in local councils and to provide an ongoing assurance in the integrity of councils and the decisions they make."

Operation of Electoral Expenditure Caps in Local Government Elections

- 3.3 The electoral expenditure caps for Local Government Elections are set out under section 31 of the Act (**the Caps**) and impose spending limits on candidates, parties and third-party campaigners during a prescribed period prior to, and including, Election Day. The imposed spending limits relate to Electoral Expenditure during the capped Local Government Expenditure period. These terms are defined in the Act and those definitions are set out below.
- 3.4 Electoral expenditure is defined in section 7 of the Act as follows:

"expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election"
- 3.5 The capped local government expenditure period is defined in section 28 of the Act as follows:
 - (a) *in the case of an ordinary election of the councillors under section 287 (1) of the Local Government Act 1993 —the period from and including 1 July in the year in which the election is to be held to the end of the election day for the election,*
 - (b) *in the case of an election of councillors under section 287(2) of the Local Government Act 1993 – the period commencing on the later of the following:*

- (i) *the day that is 3 months before the election day for the election,*
- (ii) *the day that the proclamation was made under that subsection determining the election day for the election,*

and concluding at the end of the election day for the election,
- (c) *in any other case – the period from and including the day on which the date of the election is publicly notified by the person conducting the election to the end of the election day for the election.*

Formula

- 3.6 The Caps are not fixed amounts under the Act and differing rates are applicable to parties, candidates and third-party campaigners depending on a number of variables, including whether the candidate is endorsed by a party, is running in a group and the type of local government area (**LGA**) the candidate is running in. The formula is set out under section 31 of the Act.
- 3.7 Broadly, the caps apply to:
- (a) political parties who have endorsed candidates standing for election;
 - (b) candidates endorsed by a party, both grouped and ungrouped on the ballot, standing for election;
 - (c) candidates not endorsed by a party, both grouped and ungrouped on the ballot, standing for election;
 - (d) mayoral candidates, both grouped and ungrouped, standing for election; and
 - (e) third-party campaigners who incur electoral expenditure that exceeds \$2,000 in total for the Local Government Election, discussed in paragraph 4.
- 3.8 The rates and the formula for determining the Cap are set out in section 31 of the Act. The formula for each of the categories identified in the paragraph above operates as follows:
- (a) For parties:
 - (i) \$5,000 per each LGA in which that party has an endorsed candidate; or
 - (ii) if the LGA is divided into wards, \$5,000 per ward in which the party has an endorsed candidate.
 - (b) For candidates not running as part of a group on the ballot:
 - (i) \$20,000 per candidate endorsed by a party in an electorate where the number of enrolled voters at the last general election was 200,000 or less; or
 - (ii) \$25,000 per independent candidate in an electorate where the number of enrolled voters at the last general election was 200,000 or less;
 - (iii) \$30,000 per candidate endorsed by a party in an electorate where the number of enrolled voters at the last general election was more than 200,000; or
 - (iv) \$35,000 per independent candidate in an electorate where the number of enrolled voters at the last general election was more than 200,000.

- (c) For candidate groups:
 - (i) \$30,000 per candidate groups endorsed by a party in an electorate where the number of enrolled voters at the last general election was 200,000 or less; or
 - (ii) \$35,000 per independent candidate groups not endorsed by a party in an electorate where the number of enrolled voters at the last general election was 200,000 or less; or
 - (iii) \$40,000 per candidate groups endorsed by a party in an electorate where the number of enrolled voters at the last general election was more than 200,000; or
 - (iv) \$45,000 per independent candidate group not endorsed by a party in an electorate where the number of enrolled voters at the last general election was more than 200,000.
 - (d) For mayoral candidates:
 - (i) \$15,000 per mayoral candidate grouped on the ballot in an electorate where the number of enrolled voters at the last general election was 200,000 or less; or
 - (ii) \$20,000 per mayoral candidate grouped on the ballot in an electorate where the number of enrolled voters at the last general election was more than 200,000; or
 - (iii) \$30,000 per mayoral candidate ungrouped on the ballot in an electorate where the number of enrolled voters at the last general election was 200,000 or less; or
 - (iv) \$40,000 per mayoral candidate ungrouped on the ballot in an electorate where the number of enrolled voters at the last general election was more than 200,000.
 - (e) For third-party campaigners:
 - (i) \$2,500 multiplied by the number of LGAs for which the third-party campaigner incurs electoral expenditure.
- 3.9 In by-elections, the applicable cap for a candidate, whether endorsed by a party or not, is as follows:
- (a) \$40,000 in an electorate where the number of enrolled voters at the last general election was 200,000 or less; or
 - (b) \$60,000 where the number of enrolled voters at the last general election was more than 200,000.

3.10 As set out above, the size of the electoral expenditure cap is determined in relation to variables such as the party affiliation of the candidate, the size of the electorate, the number of wards in the LGA and the grouping of the candidates on the ballot. The implications of this formula are discussed in the preceding paragraphs.

Implications and practicalities of section 31 of the Act

3.11 In our opinion, the operation of section 31 of the Act fails to adequately take into account the differing sizes of LGAs in the state and, in particular, the differing size of electorates as a result of the sporadic division of LGAs into wards across the state.

3.12 In practice, section 31 of the Act:

- (a) does not provide for consistent expenditure levels across the state;
- (b) unevenly allocated higher Caps to LGAs that are divided into wards, no matter the size of the overall LGA;
- (c) has potential to unintentionally dilute the integrity of local government elections by incentivising candidates to run for positions that attract a higher expenditure caps.

3.13 These implications are discussed below.

Inequitable Distribution

3.14 The general intention of Division 4 Part 3 of the Act is to regulate local government general elections in New South Wales by limiting the amount or value of what may be spent by each party, candidate, group or third-party campaigner. In the Second Reading Speech for the Act, The Honourable Anthony Roberts MLA stated that the expenditure caps would be struck at a lower rate than those applicable to State election in order to reflect the lower number of voters, smaller geographic areas and "*traditionally much lower spending levels in local government elections.*"

3.15 There is an obvious connection between the size of an electorate and the amount of funding that is required to fund advertising and other methods of campaigning in those electorates. For example, a candidate in an electorate of 200,000 will incur higher costs in printing campaign posters and campaign material to be visible than a candidate in an electorate of 1,000 people.

3.16 The way in which the Caps relating to parties, groups, candidates and third-party campaigners are struck unintentionally creates a situation where, in practice, a number of smaller LGAs are afforded a higher Cap than their larger counterparts (including a significantly divergent per person spend).

3.17 The divergence is largely attributable to:

- (a) the operation of section 31(2) of the Act which regulated party funding for endorsed candidates at \$5,000 per LGA or, where the LGA is divided into wards, \$5,000 per ward. This is discussed in detail in paragraph 3.20 to 3.46 below; and
- (b) the ineffective tiered allocation for candidate, group and mayoral funding discussed in paragraphs 3.14 below.

3.18 The combined effect of the way in which party, candidate and group electoral expenditure is capped under the Act has created an inequitable funding regime which is inconsistent across the Local Government Areas (**LGAs**) of New South Wales.

3.19 The practical operation and effect on the allocation of funds in relation to party, candidate, group and mayoral funding is set out below.

Party Expenditure Caps

3.20 Pursuant to section 31(2) of the Act, the Cap for a party endorsing a candidate in a Local Government General Election is fixed and is not subject to a sliding scale or tiered formula. Instead, the electoral expenditure cap is set in relation to the number of LGAs or wards in which the party has an endorsed candidate. That is, the applicable Cap for a party that endorses candidates in a Local Government General Election is \$5,000 multiplied by the number of LGAs

or, where the LGA is divided into wards, \$5,000 by the number of wards in which a candidate is endorsed.

- 3.21 Electoral wards are regulated under the *Local Government Act 1993* (NSW) (**Local Government Act**). Where an LGA is divided into wards, each ward elects an equal number of councillors to make up the whole Council for the LGA.
- 3.22 A Council may establish or abolish wards by referendum; however there is no requirement in the Local Government Act that an LGA must be divided into a ward if it reaches a certain size, or vice versa. As such, there is no consistency across New South Wales as to when or where a ward is established. For example, the City of Sydney LGA is undivided and has approximately 141,369 enrolled voters. whereas the smaller metropolitan council of Waverley, which is geographically proximate to the City of Sydney with 45,795 is divided into four wards. Similarly, the regional Council of the Walcha LGA is divided into four wards and has approximately 2,296 enrolled voters.
- 3.23 Distinguishing wards from the broader LGA has the effect of significantly increasing the Caps in LGAs which are divided into wards as opposed to those which are not. Given that there is no consistency across the State as to the size of the electorates or wards, the formula under section 31 of the Act inequitably allows higher spending in some LGAs as opposed to others, including LGAs in similar areas with similar characteristics whilst Wentworth Council has 4,054 registered voters and is undivided.

Regional LGAs

- 3.24 The disparity that is created by the applying the formula can best be understood when comparing LGAs around New South Wales. For example, the make-up of Dubbo and Orange is as follows:

Local Government Area	Registered Voters	Wards	Councillors
Orange	29,131	0	11
Dubbo	35,900	5	10
Wagga Wagga	44,131	0	9

- 3.25 Using the above example, under the formula prescribed by section 31(2) of the Act, if a party were to endorse a candidate in all three Local Government Elections, including one in each of the five wards in Dubbo, the total Caps would be as follows:
- (a) \$5,000 in Orange, amounting to approximately \$0.17 per person in the LGA;
 - (b) \$25,000 in Dubbo, amounting to approximately \$0.69 per person in the LGA; and
 - (c) \$5,000 in Wagga Wagga, amounting to approximately \$0.11 per person in the LGA.
- 3.26 Similarly, the same Caps are applicable in even smaller regional LGAs like Walcha and Wentworth. For example, those LGAs are constituted as follows:

Local Government Area	Registered Voters	Wards	Councillors
Wentworth	4,054	0	9
Walcha	2,296	4	8

3.27 Using this example, pursuant to section 31(2) of the Act, if a party were to endorse candidates in both Local Government Elections, including one in each of the four wards in Walcha, the maximum Cap available to the party would be as follows:

- (a) \$5,000 in Wentworth, amounting to approximately \$1.23 per person in the LGA; and
- (b) \$20,000 in Walcha, amounting to approximately \$8.71 per person in the LGA.

Metropolitan LGAs

3.28 The formula under section 31(2) of the Act operates in the same way in metropolitan LGAs as in regional LGAs. For example, the LGAs of the City of Sydney, Campbelltown, Canterbury-Bankstown and Waverley are constituted as follows:

Local Government Area	Registered Voters	Wards	Councillors
City of Sydney	141,369	0	9
Campbelltown	105,648	0	15
Canterbury-Bankstown	224,592	5	15
Waverley	45,795	4	12

3.29 Using this example, pursuant to section 31(2) of the Act, if a party was to endorse candidates in each of the above Local Government Elections, including in each of the wards in Canterbury-Bankstown and Waverley, the applicable Caps would be as follows:

- (a) \$5,000 in the City of Sydney, amounting to approximately \$0.03 per person in the LGA;
- (b) \$5,000 in Campbelltown, amounting to approximately \$0.05 per person in the LGA;
- (c) \$25,000 in Canterbury-Bankstown, amounting to approximately \$0.11 per person in the LGA; and
- (d) \$20,000 in Waverley, amounting to approximately \$0.44 per person in the LGA.

Distribution amongst LGAs

3.30 In comparing the maximum Caps in rural and metropolitan areas, it is clear that there is no consistency with respect to how the Caps are applied and that there is an obvious disparity of available funding, not only when comparing metropolitan and regional areas but metropolitan and regional areas themselves. This disparity is further compounded when the candidate and group Caps are considered.

Candidate Expenditure Caps

- 3.31 Electoral expenditure caps for candidates are set out under sections 31(3) and (4) of the Act. The electoral expenditure caps are tiered, with the cap increasing if the relevant LGA or ward is comprised of more than 200,000 registered voters. The formula for the Cap is set out in paragraph 3.5(c) above.
- 3.32 A lower Cap is applicable to a party endorsed candidate than an independent candidate. An independent candidate is allowed a \$5,000 higher Cap than the party endorsed candidate. Operatively, the combined electoral expenditure cap for party endorsed and independent candidates when taking into account the party expenditure cap allowed under section 31(2).
- 3.33 The two-tiered cap separates electorates between under and over 200,000 registered voters. There are currently 128 LGAs in New South Wales and of those, only the LGAs of Liverpool, Blacktown, Canterbury-Bankstown and the Central Coast have over 200,000 people in the whole LGA. However, each of these LGAs is divided into wards and therefore do not trigger the higher Cap as each of the wards do not have electorates of over 200,000 people.
- 3.34 Although the Caps set out in sections 31(3) and (4) of the Act provide for two-tiers of capping based on the size of the electorate, the delineation between electorate sizes of above and below 200,000 registered voters is currently ineffective as there are no wards or LGAs which will trigger the higher limit.
- 3.35 The current effect of sections 31(3) and (4) of the Act is that the same Cap is applicable to candidates in all electorates across the State. Similar to the party Caps under section 31(2) of the Act, the formula:
- (a) skews the available electoral expenditure for candidates in a way that the per person budget in larger metropolitan LGAs (such as the City of Sydney) is significantly less than LGAs in regional New South Wales (such as Walcha); and
 - (b) compounds the inconsistency of available funds in comparative electorates.
- 3.36 For example, the LGA of Walcha has 2,296 registered voters and is divided into four wards. A candidate standing for election in a ward of approximately 570 registered voters in Walcha will be allocated the same Cap of \$20,000 as a candidate standing for election in Wagga Wagga with an electorate of 44,131 registered voters.
- 3.37 Whilst The Honourable Anthony Roberts MLA stated in his Second Reading Speech for the Bill that spending levels in Local Government Elections are traditionally lower than spending in State elections, by failing to distinguish between the vastly differing sizes of the LGAs across New South Wales, the Caps may have the unintended effect of:
- (a) creating a prohibitive funding structure for candidates in larger metropolitan LGAs, with significantly larger LGAs where it is traditionally more costly to run campaigns; and
 - (b) creating a situation where spending in smaller, regional LGAs is disproportionate to the electorate size and as such, encouraging higher levels of unnecessary spending which may preclude fair and open elections to independent, self funded candidates.
- 3.38 In our opinion, the delineation between electorates of 200,000 registered voters and more is inadequate to properly facilitate an electoral expenditure regime which properly reflects and addresses the differing sizes of New South Wales LGAs.

Group Expenditure Caps

- 3.39 Electoral expenditure caps for groups of candidates are set out in sections 31(5) and (6) of the Act. The same two-tiered approach that applies to candidate funding is applicable to groups of candidates and therefore the same inadequacies and issues arise. We repeat our commentary in paragraphs 3.31 to 3.38 above.

Mayoral Candidate Expenditure Caps

- 3.40 Electoral expenditure caps for mayoral candidates are set out in sections 31(7) and (8) of the Act. The same two-tiered approach that applies to candidate and group funding is applicable to mayoral candidates and therefore the same inadequacies and issues arise. We repeat our commentary in paragraphs 3.31 to 3.38 above.
- 3.41 Section 31(14) of the Act states that, for the avoidance of doubt, if a person is a candidate for election as a councillor and is a candidate for election as mayor as the same general election, the applicable cap for that person is the Cap for a mayoral candidate under sections 31(7) and (8) of the Act. The implication of this section is discussed below.

Integrity of Mayoral Elections

- 3.42 Pursuant to section 283 of the *Local Government Act 1993* (NSW) (**Local Government Act**), a candidate for election as a councillor at a local government election may stand for election as a mayor in that same election.
- 3.43 Section 31(14) of the Act states that, if a candidate is running for mayor and councillor at the same time, the applicable electoral expenditure cap for the person is the relevant applicable cap for a candidate for mayor.
- 3.44 The electoral expenditure caps that are accessible to mayoral candidates are \$10,000 higher than the caps applicable to party endorsed and independent candidates and allow grouped candidates to access an additional electoral expenditure cap of \$15,000 or \$20,000, depending on the size of the electorate.
- 3.45 In an LGA where a decision under section 227 of the Local Government Act has been made for the Mayor to be elected directly by the electorate, the combined effect of section 283 of the Local Government Act and section 31(14) of the Act is that a person may be a candidate for election as mayor and a candidate for election as a councillor at the same time and, in doing so, access the higher expenditure cap prescribed for Mayoral candidates and to circumvent the expenditure caps otherwise prescribed in section 31 of the Act.
- 3.46 The unintended effect, particularly in larger electorates where it is considered that the Caps under section 31 are low and insufficient to properly fund campaigns, may be to encourage candidates who have no other intention of running for Mayor to nominate in order to access the higher Cap.

Penalties for non-compliance

- 3.47 It is unlawful for a party, group, candidate or third-party campaigner to incur electoral expenditure for a State election campaign or a local government election campaign during a capped expenditure period if it exceeds the applicable Cap.
- 3.48 The penalties for non-compliance are set out under Part 10 Division 1 of the Act. Specifically, section 143 of the Act states that a person who exceeds the Caps set out in section 31 of the Act and who, at the time was aware that exceeding the Cap under the Act would be unlawful is guilty

of an offence. The maximum penalty for this offence is 400 penalty units (\$44,000), two years imprisonment or both.

4 Third-party Campaigners

- 4.1 The Act imposes electoral expenditure caps on third-party campaigners in both State Government and Local Government Elections and prohibits third-party campaigners from acting in concert with other persons to incur electoral expenditure that exceeds the cap on electoral expenditure for a third-party campaigner.
- 4.2 A third-party campaigner is defined in section 4 of the Act as a person or entity who incurs electoral expenditure that exceeds \$2,000 in total for a State or Local Government election during a capped expenditure period, also defined under section 4 of the Act.

Electoral Expenditure Caps

State General Elections

- 4.3 The Act has approximately halved the electoral spending available to third-party campaigners in State General Elections. In the Bill's Second Reading Speech, the Honourable Anthony Roberts MLA stated that the Caps had been lowered in response to the Expert Panel's recommendation that "*third-party campaigners should have sufficient scope to run campaigns to influence voting at an election – just not to the same extent as parties or candidates.*"
- 4.4 The Cap for third-party campaigners in State general elections is fixed under section 29(10) of the Act. The applicable Caps are as follows:
- (a) \$500,000 if the third-party campaigner was registered under the Act before the commencement of the capped State expenditure period for the election (defined in section 27 of the Act); or
 - (b) \$250,000 if the third-party was not registered under the Act before the commencement of the relevant capped State expenditure period; or
- 4.5 A cap of \$20,000 is applicable for each third-party campaigner for each by-election.
- 4.6 The Cap is further qualified in section 29(12) of the Act by stating that the third-party campaigner is limited to a maximum of \$61,500 if registered and \$24,700 if unregistered in each electorate. The operative effect is that the third part campaigners cannot spend \$500,000 campaigning in one electorate, but rather, it can only spend a maximum of \$61,500 in one electorate, to a maximum of \$500,000.

Local Government Elections

- 4.7 The Cap for a third-party campaigner in a local government general election is set under section 31(10) of the Act. Unlike State general elections, the Cap for local government elections is not fixed. It is determined by reference to the number of LGAs in which the third-party campaigner incurs electoral expenditure. For example, if a third-party campaigner were to distribute campaign fliers in two different LGAs for the dominant purpose of influencing the vote at the election, the total expenditure cap for that third-party campaigner would be \$5,000.
- 4.8 Section 31(12) of the Act further qualifies the electoral expenditure cap in circumstances where the third-party campaigner is campaigning in more than one election by limiting the expenditure in each LGA to \$2,500. In effect, this prohibits a third-party campaigner from circumventing the Cap by campaigning in additional LGAs for the purpose of increasing the overall Cap and

spending that increased amount in one LGA. For example, where a third-party campaigner has a maximum Cap on \$5,000 for campaigning in two LGAs, it cannot spend \$500 in one LGA and \$4,500 in the other.

Prohibition on "acting in concert"

- 4.9 As stated in paragraph 4.1 above, the Act prohibits third-party campaigners from acting in concert with other persons to incur electoral expenditure that exceeds the applicable cap for the third-party campaigner. This prohibition is set out in section 35 of the Act.
- 4.10 In practice, the provision prohibits third-party campaigners from joining or assisting other campaigns once their maximum cap has been reached. In the event that a third-party campaigner spends the maximum amount in one election, they are prohibited from diverting resources to another campaign run by another entity in order to continue their campaign on another third-party campaigner's budget. This includes any kind of electoral expenditure under section 7(1) of the Act, including office accommodation, staff and research. Any campaigns that are done in concert with or in conjunction with another third-party campaigner must be done within the Caps permitted under sections 29(10) and 31(10) of the Act.
- 4.11 The purpose of this provision is set out in the Second Reading Speech for the Bill by The Honourable Anthony Roberts MLA stating that the purpose is to prohibit third-party campaigners from circumventing the electoral expenditure caps in order to "*maintain a fair and balanced electoral contest and to ensure the integrity of the expenditure caps.*"
- 4.12 Under section 35(2) of the Act, a person 'acts in concert' with another person if that person acts under an agreement (whether formal or informal) with the other person in order to campaign with the object, or principal object, of having a particular party, elected member or candidate elected, or opposing the election of a particular party, elected member or candidate.
- 4.13 The test for determining whether two parties are acting 'in concert' with each other is a broad test. In operation, for the activity to be considered electoral expenditure which is incurred in concert with another party, an object of the activity must be to:
- (a) have a particular party, elected member or candidate elected; or
 - (b) oppose the election of a particular party, elected member or candidate.
- 4.14 Importantly, that object does not have to be the dominant purpose of the activity in order to count towards the Cap.

Penalties for non-compliance

- 4.15 Exceeding the Caps set for third-party campaigners in both State and Local Government Elections may attract serious penalties under the Act. Specifically:
- (a) section 143(1) of the Act creates an offence for exceeding the relevant Cap if, at the time that the Cap was exceeded, the person was aware of the fact that they were incurring expenditure in excess of the Cap will be guilty of an offence; and
 - (b) section 144 of the Act creates an offence for entering into a scheme for the purpose of circumventing a prohibition or requirement under Part 3 of the Act (which includes the prohibition against third-party campaigners acting in concert with other) will be guilty of an offence.
- 4.16 A penalty under section 143(1) of the Act carries a maximum penalty of up to 400 penalty units, amounting to \$44,000, two years imprisonment or both.

- 4.17 A penalty under section 144 of the Act, upon conviction or indictment, carries a maximum penalty of 10 years imprisonment.
- 4.18 Further, section 58(5) of the Act states that if a third-party campaigner incurs electoral expenditure in contravention of section 35 of the Act, being the prohibition on acting in concert with another party, an amount equal to double the amount or value of the expenditure is to be payable by that person to the State and may be recovered by the Electoral Commission of NSW as a debt due to the State.

Risks

Ambiguous Legislation

- 4.19 The provisions relating to third-party campaigners are complex and onerous. Breach of the provisions can result in serious penalties.
- 4.20 Sections 29(12) and 31(12) both impose electoral expenditure caps within the Caps that are prescribed under section 29(10) and 31(10) by restricting the amounts that can be spent in each electoral district in relation to State Government Elections and each LGA or ward in a Local Government General Election.
- 4.21 Although the Caps for third-party campaigners in State Elections are fixed at \$500,000 (if registered), irrespective of the number of electoral districts in which they campaign, a third-party campaigner may only spend \$61,500 in each electoral district. For example, the third-party campaigner cannot spend all \$500,000 in the seat of Strathfield only.
- 4.22 Similarly, in Local Government General Elections, the third-party campaigner can spend a maximum of \$2,500 in each LGA or ward. Section 31(12) qualifies that, although the maximum Cap is determined by multiplying \$2,500 by the number of LGAs in which the third-party campaigner is campaigning, however, although the maximum spend is set in such a way, section 31(12) further qualifies that the maximum expenditure for each LGA is, in fact, \$2,500. Given the qualification is section 31(12), the function of section 31(10) in determining the applicable Cap appears to be obsolete and confusing.
- 4.23 Given the confusing way in which sections 29(12) and 31(12) operate, there is a real risk that the actual applicable Caps will be misunderstood and could be unintentionally breached.

Acting in concert

- 4.24 As stated above, section 35 of the Act prohibits third-party campaigners from acting in concert with another person or persons in order to incur electoral expenditure that exceeds the applicable Cap during a capped expenditure period for an election.
- 4.25 Although the section prohibits joint campaign activity that incurs electoral expenditure in excess of the Cap, it does not prohibit third-party campaigners from acting in concert together when below the applicable Cap. It seems that, although the intention of the section is to prohibit third-party campaigners from continuing to campaign with another party once they have reached the Cap, the section also affects how electoral expenditure is to be incurred and attributed for amounts that are below the Cap. It is unclear as to how any such joint campaigns which incur expenditure beneath the Cap are to be attributed. For example, does each party count only the money that they have incurred in that campaign, or is the cost of the campaign split between the two parties?
- 4.26 It is likely that such ambiguity will lead to third-party campaigners unintentionally exceeding the applicable Caps and diminishing the integrity of the provision.

5 Constitutionality of Provisions

- 5.1 We have been asked to consider whether the third-party Caps imposed under Part 3 Division 4 of the Act, in both State and Local Government Elections, are consistent with the *Commonwealth of Australia Constitution Act (The Constitution)* and, in particular, whether the provisions impermissibly restrict the implied freedom of communication (**implied freedom**).
- 5.2 As stated above, the third-party caps are applicable at the State and Local Government level. The provisions set out in Part 3 Division 4 of the Act do two things, they:
- (a) limit the electoral expenditure a third party can incur during the capped period;
 - (b) limit the extent to which a third-party campaigner can act in concert with other third-party campaigners.
- 5.3 It is therefore necessary to assess whether these operations are consistent with the implied freedom.

Implied Freedom of Communication

- 5.4 The implied freedom of communication is derived from the Constitution. There is a line of unbroken authority which states that the implied freedom is an incident of the system of representative government provided for in the Constitution¹. Specifically, sections 7 and 24 of the Constitution direct that both Houses of Parliament are to be directly chosen by the people of the Commonwealth and the States. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**), the Court found that the indispensable incident of such a direction is that sections 7 and 24 (and other related sections) of the Constitution protect the implied freedom so that people are able to exercise a free and informed choice as electors.
- 5.5 Although the intent of the implied freedom protects an elector's ability to form judgements and make informed choices regarding who to elect, the implied freedom is not a personal right². The implied freedom is to be understood in relation to promoting the free flow of information that might influence an elector's judgement and opinion³, protecting the information and not the personal right.
- 5.6 Consequently, in considering whether the provision restricts the implied freedom, we are required to consider how the provisions affect the free flow of information, rather than who it personally affects.

Application of Implied Freedom at the State and Local Government Levels

Political Communication

- 5.7 The EFED Act previously distinguished between electoral expenditure and electoral communication expenditure. This distinction has been repealed in the Act. The definition of electoral expenditure under section 7 of the Act explicitly includes, amongst others, expenditure of the following kind:
- (a) expenditure on advertisements in radio, television, the internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material;

¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Unions NSW v New South Wales* [2013] HCA 58 [17]

² *Unions NSW v New South Wales* [2013] HCA 58 [36]

³ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 160

- (b) expenditure on the production and distribution of election material; and
 - (c) expenditure on the internet, telecommunications, stationery and postage.
- 5.8 This definition under section 7 of the Act is in the same terms as the previous definition of electoral communication expenditure under section 87(2) of the EFED Act. In the *Unions NSW v New South Wales* [2013] HCA 58 (**Unions NSW Case**), commenting on electoral communication expenditure, the Court found that “*there is an obvious connection between the need to fund advertising and other methods of communication in connection with election campaigns.*”⁴ As the definition of electoral expenditure includes the terms previously defined in relation to electoral communication expenditure, the statements made by the Court in the Unions NSW Case are analogous and are applicable to electoral expenditure under section 7 of the Act.
- 5.9 This is so as the Cap will influence the level to which a third-party campaigner is able to produce advertisements, distribute election material and participate in online campaigns.

State and Local Government

- 5.10 The provisions in Part 3 Division 4 of the Act relate to both State Government and Local Government Elections. Despite the implied freedom being derived from the Constitution in reference to the election of the Federal Parliament, the implied freedom of communication is equally applicable to communication relating to State and Local Government Elections. In the Unions NSW Case, citing the judgment of French CJ in *Hogan v Hinch* (2011) 243 CLR 506, the Court found that, “*the reality is that there is significant interaction between the different levels of government in Australia and this is reflected in communication between them.*”
- 5.11 The Court continued to state (and it is worth repeating in full):
- “the complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication. As was observed in Lange, these factors render inevitable the conclusion that the discussion of matters at a State, Territory and local level might bear upon the choice that the people have to make in federal elections and in voting to amend the Constitution, and upon their evaluation of the performance of federal Minister and departments.”*⁵
- 5.12 Although it was not necessary for the Court to strictly consider Local Government Elections in the Unions NSW Case, in our opinion, the pronouncements made by the Court leave no ambiguity as to its application to both State and Local Government Elections.

Lange Test

- 5.13 In circumstances where the implied freedom is applicable, the Court has applied a two limbed test in order to determine whether the impugned law impermissibly burdens the implied freedom. That test is set out in the Lange case and asks the following questions:
- (a) Does the law burden political communication?
 - (b) Does the law serve a legitimate end and, if so, does the law proportionately burden the implied freedom to serve the legitimate purpose?
- 5.14 These questions are discussed below in relation to sections 29(10), 29(12), 31(10), 31(12) and 35 of the Act.

⁴ *Unions NSW v New South Wales* [2013] HCA 58 [7]

⁵ *Unions NSW v New South Wales* [2013] HCA 58 [25]

Does the law burden political communication?

- 5.15 As set out above, the first limb of the Lange test considers whether the provisions in sections 29(10), 29(10), 31(10), 31(12) and 35 burden the implied freedom, either in their terms, operation or effect. The identification of the extent of the burden so imposed is not relevant to this first limb⁶.
- 5.16 In our opinion, the general scheme of capping electoral expenditure, for any party, whether it is a political party, candidate, group or third-party campaigner, effectively burdens the implied freedom because it places a ceiling on the amount which may be expended on electoral communications. In doing so, it limits the extent to which a third-party campaigner is able to put across its political ideas and opinions through advertising and other means. Although not in contention in the Unions Case, French CJ at paragraph [41] stated that the EFED Act affected burdens on the implied freedom as it placed a ceiling on the amount which may be expended on electoral communications.
- 5.17 Accordingly, in our opinion, sections 29(10), 29(12), 31(10) and 31(12) of the Act burden the implied freedom and satisfy the first limb of the Lange Test for the reasons set out by the Court in the Unions NSW Case. Similarly, section 35 of the Act operates in a way which restricts the amount of value of electoral expenditure that a third-party campaigner can incur and the way in which third-party campaigners can campaign. It is likely to be found that the provision similarly burdens the implied freedom.
- 5.18 It is important to note, however, that imposing a burden on the implied freedom does not necessarily lead to the conclusion that the provisions of the Act are invalid. Legislation which restricts the implied freedom of political communication will not be found to be invalid on that count alone, but rather, the legislation will be invalid where it burdens the freedom in a way that affects the system of government for which the Constitution provides.

Does the law serve a legitimate end and is it proportionate?

- 5.19 Where the statutory provisions burden the implied freedom, the second limb of the Lange test asks whether the provision is proportionate in order to serve a legitimate end that is compatible with maintaining the system of representative government⁷. It is therefore necessary to consider whether sections 29(10), 29(12), 31(10), 31(10) and 35 of the Act are a legitimate means of pursuing a legitimate objective.
- 5.20 In order to answer this question, it is necessary to identify the true purpose of the statutory provision. The Act's objectives are set out in section 3 of the Act and, generally, those objectives are set out as promoting transparent and accountable elections in order to address the possibility of undue or corrupt influence in elections. In the Unions Case, the Court commented in relation to the EFED Act that the anti-corruption purposes of the Act are unlikely to be doubted. In our opinion, the same is likely to be found in relation to the Act.
- 5.21 Therefore, the next step is to identify whether the provisions are proportionate to serve that legitimate purpose in a manner that is compatible with the maintenance of the prescribed system of representative government⁸. In the Unions Case, the Court set out that the availability of alternative, less restrictive options may help to inform the provision's proportionality. The Court stated as follows:

⁶ *Unions NSW v New South Wales* [2013] HCA 58 [40]

⁷ *Unions NSW v New South Wales* [2013] HCA 58 [44]

⁸ *ibid*

"the enquiry whether a statutory provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so."⁹

- 5.22 In considering whether the provisions are proportionate, it is necessary to balance the public interest in the maintenance of the implied freedom against the public interest which the provision is designed to serve, in this case, the promotion of transparent and accountable elections in order to address the possibility of undue or corrupt influences.

Application

- 5.23 Arguably, the expenditure caps imposed on third-party campaigners in Local Government Elections by sections 31(10) and 31(12) impose a severe restriction on the implied freedom of communication, particularly in densely populated LGAs that is disproportionate to the legitimate objectives of the Act. A third-party campaigner's ability to campaign, to buy and publish advertisements in newspapers or to run a social media campaign is severely restricted, almost to the extent of an inability to participate, by the low expenditure cap (\$2,500) that is afforded under the provisions, particularly when read in conjunction with the activities that are caught under the definition of electoral expenditure in section 7 of the Act.
- 5.24 Further, it is clear that the restrictions could be struck in a different manner (as even is evidenced by the section 29(10) of the Act). In particular, section 31(10) of the Act is selective in applying the formula (\$2,500 multiplied by the number of LGAs in which the third-party campaigner incurs electoral expenditure) as it does not distinguish between wards and LGAs, such as sections 31(2),(3),(4),(5),(6) and (9). For example, as party electoral expenditure is capped in relation to the number of LGAs or wards in which they participate, the available spending for third-party campaigners in divided LGAs will be disproportionate to maximum allowable party funding. The basis for this selection is not identified and is not apparent.
- 5.25 For these reasons, we are of the opinion that sections 31(10) and 31(12) impermissibly restrict the implied freedom of communication as set out in the Constitution.
- 5.26 The provisions relating to State Government elections provide a fixed rate of electoral expenditure. In our opinion, although similar arguments may be made regarding the operation of the Cap in restricting the third-party campaigner's ability to participate in the electoral process, it is perhaps less likely that the Court would find that the provisions impermissibly restrict the implied freedom of communication, particularly as the provisions largely remain unchanged from the previous EFED Act.
- 5.27 Section 31 of the Act prohibits third-party campaigners from acting in concert with each other in circumstances where the maximum Cap has already been incurred.
- 5.28 It should be noted that the section does not restrict joint campaigns by third-party campaigners, but says that in these circumstances, the electoral expenditure that is incurred must be counted towards that third-party's total.
- 5.29 The objective of the section is said to prohibit the third-party campaigner from circumventing the prescribed Caps once the maximum has been reached, therefore protecting the integrity of the Caps. In the Seconding Reading Speech for the Act, the Honourable Anthony Roberts MLA said that:

"Third party campaigners should not be permitted to engage in conduct to circumvent spending caps. The anti-avoidance offence in clause 35 is important to maintain a fair and balanced electoral contest and to ensure the integrity of the expenditure caps."

⁹ *ibid*

- 5.30 This is likely to be considered a legitimate purpose by the Court and therefore it is necessary to examine whether the section is proportionate in meeting that end.
- 5.31 In assessing whether the section is proportionate, it is necessary to understand how the provision is to operate. The provision states that it is unlawful for a third-party campaigner to act in concert with another person or other persons to incur electoral expenditure during the capped expenditure period that "*exceeds the applicable cap for the third-party campaigner for the election.*" Section 31(2) states that 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:
- (a) having a particular party, elected member or candidate elected; or
 - (b) opposing the election of a particular party, elected member or candidate.
- 5.32 It is somewhat unclear as to how, and to what extent, joint campaign expenditure is to be attributed to each third-party campaigner's expenditure cap. For example, does each party count only the money that they have incurred in that campaign, or is the cost of the campaign split between the two parties?
- 5.33 Although the apparent objective of the Act is to prohibit third-party campaigners from engaging in conduct that circumvents the applicable Caps, the operation of the Act may have the disproportionate effect of attributing electoral expenditure to the third-party campaigner that the campaigner has not itself incurred. This will further limit the third-party campaigner's ability to participate in the electoral process, particularly in Local Government Elections where the expenditure caps are already restrictive and could effectively discourage third-party campaigners from participating in joint campaigns. Given this effect, it may be considered that the provision permissibly burdens the freedom of communication by limiting a kind of certain kind of campaign activity.
- 5.34 Given the complexity of the issue of constitutionality of the specific provisions of the Act, we recommend an opinion be sought from Senior Counsel with respect to this issue.

6 Objectives of the Act

- 6.1 The objectives of the Act are defined in section 3 of the Act. In assessing whether the operative provisions of the Act meet those objectives, it is useful to repeat them in full below:
- (a) to establish a fair and transparent electoral funding, expenditure and disclosure scheme;
 - (b) to facilitate public awareness of political donations;
 - (c) to help prevent corruption and undue influence in the government of the State or in local government;
 - (d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose;
 - (e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme.
- 6.2 In the Second Reading Speech for the Act, The Honourable Anthony Roberts MLA stated that the reforms introduced in the Act aimed to create a "*simpler and easier to understand*" Act which had

a “stronger and more transparent electoral funding scheme” as opposed to the EFED Act which was stated to have become “complex and difficult to administer.”

6.3 In our opinion, although the Act has introduced new restrictions in relation to the electoral funding scheme, particularly in Local Government Elections, the Act has failed to adequately meet the objectives set out in section 3 of the Act. Specifically:

- (a) section 31 of the Act, which drastically skews electoral expenditure in the LGAs does not further the legitimate objective set out in section 3(a) of the Act of establishing a fair electoral expenditure scheme. Although the Act’s objective is to create a fair scheme, the formula that it provides is inherently unfair as it:
 - (i) fails to account for the varying sizes of each LGA;
 - (ii) burdens the candidates in larger electorates by restricting the funds available to them in pursuing their campaigns, particularly in comparison to elections in smaller LGAs;
 - (iii) does not provide equal expenditure that is proportionate to the electors or LGAs, even in electorates in similar areas and of similar sizes;
 - (iv) allocates significantly higher per capita electoral spending for registered voters in smaller LGAs;
 - (v) does not allow for adequate funding for campaigns in more densely populated LGAs and where it is typically more expensive to run campaigns; and
 - (vi) does not reasonably reflect the expenses of running a campaign in larger metropolitan LGAs.
 - (vii) creates the potential for prohibitively high spending expectations for independent candidates in smaller electorates and may result in a situation where independent candidates cannot afford to participate in the electoral process.
- (b) the relatively high per person Caps that are allowed in LGAs such as Walcha and Wentworth may operate adversely and contrary to section 3(c) of the Act. In General Local Government Elections where it is recognised that expenditure is generally significantly lower than in other elections, proportionately high electoral expenditure caps may result in a situation where independent candidates cannot afford to participate in the electoral process. This is particularly the case in smaller regional electorates;
- (c) given the relatively low Caps imposed by section 31 of the Act, section 31(14) of the Act incentivises and creates a loophole for candidates to stand for election as Mayor in order to access the higher Cap, diluting the integrity of Mayoral elections. These kinds of loopholes appear to be in contravention of section 3(a) of the Act;
- (d) section 31(10), 31(12) and 35 create unfair expenditure schemes where third-party funders are allowed insufficient funds to effectively participate in the electorate process and may have the effect of making joint campaigns between third-party campaigner unfeasible.

6.4 For the reasons set out directly above, in our opinion, the provisions of the Act discussed in this advice do not further the objectives identified in section 3 of the Act and it has failed to establish a regime that is fair and equitable to all registered voters across New South Wales. In our opinion, the provisions of the Act are therefore contrary to the objectives set out in section 3 of the Act.

7 Referral to Joint Standing Committee

- 7.1 The operation of section 31 of the Act and the inequitable results of the formula's application have previously been raised before Parliament and, during the passage of the Act's Bill, it was said that the matters would be referred to the Joint Standing Committee on Electoral Matters (**the Committee**) for consideration and amendment. We have been requested to comment on the likely timing of the return of the Committee's report once it has been referred, particularly in light of the upcoming State General Elections in March 2019 and the Local Government General Elections in September 2020.
- 7.2 Joint Standing Committees are appointed for the term of the Parliament by resolution of both Houses of Parliament. They are administered by the Legislative Assembly and the Assembly's Standing Orders. The current Committee was established by resolution passed on 28 May 2015.
- 7.3 The Assembly's Standing Orders do not prescribe any time line or time frame for completion of an inquiry that is referred to a joint Standing Committee. Standing Order 322 merely states that "*the House shall receive a report of any joint committee proceedings from one of its Members on that Committee.*"
- 7.4 The resolution establishing the Committee states that it is to inquire into matters that are referred to it by either House of Parliament or Minister. The matters that the Committee is to report on include, amongst other things, the EFED Act. It may be that the terms of reference ought to be amended to refer specifically to the Act.
- 7.5 The website for the Joint Standing Committee provides that once the matter has been referred to the Committee, typically the following steps take place:
- (a) the Committee opens submissions for a period of three months;
 - (b) a public hearing is held;
 - (c) the Committee then drafts a Report;
 - (d) the Government has six months to respond to the Committee's report; and
 - (e) the Government then tables its recommendation in Parliament.
- 7.6 Once this process is concluded, the Government then decides which recommendations it will act on.
- 7.7 As stated above, there are currently no Standing Orders or guidelines which dictate the time frame by which a Standing Committee must finalise a report. The only exception to this is Standing Order 303A which states that, once a report from a committee is tabled, the relevant Minister must, within six months of the tabling of the Committee's Report, report to the House what, if any action, the Government will take in relation to the Committee's recommendations. If the Minister seeks to report their response at a time when the House is not sitting, the Minister is to present their response to the Clerk and report to the House at its next sitting,
- 7.8 The policy reason behind not setting a strict time frame is that the time frames are often dictated by the scope, subject matter and the urgency of the Report. On review of the matters that have been referred to the Committee by this Parliament, a typical time frame for the Government to respond to the Report is approximately 18 months (including the Minister's response).
- 7.9 If a matter is urgent, the Minister referring the matter to the Committee may specify that the matter is urgent and specify a short deadline for when the Committee's Report must be returned.

- 7.10 In our opinion, given the complex nature of this Act and the significance of its effects particularly on Local Government elections, it is imperative that the Act should be referred to the Committee immediately. Further the referral should contain a requirement that the Committee issues its report prior to the State election.

Conclusion

- 7.11 The Act has introduced significant reforms to the State's electoral funding, expenditure and disclosure laws, particularly as it relates to Local Government Elections. The current operation of the Act which determine party, candidate, group and third-party campaigner electoral expenditure caps in those elections are misconceived and creates an inequitable regime which will severely impact the manner in which campaigns are able to be run. Additionally, the provisions in the Act are confusing and unclear in the way in which they regulate electoral expenditure to the extent that it may lead to unintentional breaches of the Act, diminishing its integrity.
- 7.12 In our opinion, the legislation must be reviewed in order to ensure that it meets the objective set out in section 3(a) of the Act to "*establish a fair and transparent electoral funding, expenditure and disclosure scheme.*" If the Act is not referred to the Committee as a matter of urgency and amended prior to the Local Government General elections scheduled in September 2020, the provisions will operate adversely and severely impact the manner in which campaigns are able to be run. If the Local Government elections proceed under the provisions of the current Act, in some electorates, candidates, campaigners and parties will be severely hindered in their campaign activity and may not be able to adequately and effectively present their position on factors which impact their constituents. Conversely, in smaller electorates where the provisions of the Act operate to provide high levels of electoral expenditure, those elections will run at an increased risk of precluding certain independent candidates from fairly competing and participating in the electoral process.
- 7.13 Given the likely time frames provided for in receiving the Committee's report and the Government responding to that report, the matter should be referred to the Committee as a matter of urgency.

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