

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

**Organisation:** Clover Moore Independent Team

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**Submission to The Joint Standing Committee on Electoral Matters:  
Inquiry into the Impact of Expenditure Caps for Local Government Election  
Campaigns  
by the Clover Moore Independent Team**

## **Executive Summary**

The 2018 amendments to the NSW *Electoral Funding Act* extend expenditure caps in NSW to cover local government elections. The current caps are **inequitable, difficult to interpret and damaging for local democracy in NSW**.

**To make an informed voting decision**, NSW voters need election candidates to publicly present their vision, policy and commitments. The current caps are overly restrictive and will **stifle political discussion and debate**. The complex legislation results in **16 applicable expenditure caps** that are difficult to apply to practical campaign circumstances.

We recommend that the election expenditure caps be set at an amount **consistent with the existing NSW State election expenditure caps**, adjusted on a **proportional basis for the number of enrolled voters in each local government area**.

The current caps are based on **flawed assumptions and incorrect information**, most highlighted by the Minister's statement that the caps reflect '*the lower number of voters, smaller geographic areas and traditionally much lower spending levels*'. The facts are:

- At the last local government elections (2016 and 2017), the **number of voters varied from as low as 957 in Brewarrina Shire to 250,818 for Central Coast Council**, while state electorate numbers are consistent (plus or minus 10 per cent).
- In 2016, **18 local councils had voting numbers greater than the lowest state electoral enrolment** (53,570 voters in Cootamundra). **In 2017, 19 councils had enrolments equal to or greater** than the average enrolments for state electorates.
- **Local government areas vary considerably and can be larger than state electorates**. The City of Sydney, with a 2016 enrolment of 141,369 voters covers an area of 25 square kilometres. It overlaps the state electorates of Newtown, Sydney, Balmain and Heffron.
- **The current expenditure caps create significant inequity across NSW**. For example, the applicable caps appear to be an average of **21 cents** per registered voter for the City of Sydney and **\$49.21** cents a voter in in C Ward of Warren Council.
- **Australian elections have common features, challenges and costs, irrespective of whether they are local, state or federal**.

***For the City of Sydney, the current cap would be expended by one campaign flier to all enrolled voters at the Australia Post cheap unaddressed mail rates.*** An effective campaign faces many unavoidable costs—other printed material, how-to-votes, posters, t-shirts, campaign office rent and on-line/traditional media. Most of these are not fixed costs and increase based on the number of voters and the size and complexity of the local area.

The current caps will prohibit even the most basic election campaign. The Committee needs to seek realistic data about local government campaign costs and cost drivers before **setting caps that allow for and support local democracy**.

**The State election expenditure caps appear to have been set at more realistic levels**, resulting in around \$2.18 for political parties and \$3.26 for Independent candidates.

**It is recommended that local government election expenditure caps align with state caps, set on a per voter basis to address major differences in registered voter numbers**, with a minimum cap to avoid negative impacts on smaller local government areas.

## A. Introduction

This submission is made on behalf of the Clover Moore Independent Team, a registered local government political party established to support the election of Clover Moore Independent Team candidates for City of Sydney elections.

The Clover Moore Independent Team comprises a group of Independents with common values. The Clover Moore Independent Team was registered as a local government political party prior to the 2008 elections for the sole purpose of providing an identifiable name above the line on the councillor election ballot paper. This was to make it easier for voters to make a formal vote above the line and to reduce the risk of informal voting.

The *Electoral Funding and Disclosures Amendment Act 2010* introduced caps on election campaign expenditure for NSW state elections. The *Electoral Funding Act 2018* extends campaign expenditure caps to local government elections.

The Terms of Reference for this Inquiry limit the Committee to considering the level of expenditure caps and the way they are set. They do not enable the Committee to consider the merits of imposing expenditure caps.

Expenditure caps for local government election campaigns are set out in section 31 of the *Electoral Funding Act 2018*. A legal opinion provided by McCulloch Robertson Lawyers<sup>1</sup> (hereafter The Legal Opinion) summarises the way expenditure caps are determined:

*“... 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,<sup>2</sup> the number of wards in the electorate and the grouping of candidates on the ballot.”<sup>3</sup>*

These variables result in **16 applicable expenditure caps**.

**This submission argues that the expenditure caps set out in section 31 are based on flawed assumptions about local government and the nature and cost of local government elections. This has led to the caps being set at levels that would inhibit local democracy by preventing even the most basic local government election campaigns.**

The submission shows that for most NSW voters, local government and state election campaigns are similar and have the same cost drivers. Yet the expenditure caps for local government election campaigns are significantly lower than those set for state election campaigns.

**The Committee should seek more information about local government campaign costs and cost drivers in considering appropriate caps.**

There are significant inequities in local government expenditure caps due to the variations in council populations and electoral enrolments. These inequities are intensified due to the formula for setting caps where councils are divided into wards.

Section 31 of the Act also sets out the method for setting expenditure caps for councils divided into wards. The applicable expenditure cap is multiplied by the number of wards. This leads to significant inequities in the caps for divided and undivided councils and between councils with different numbers of wards.

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<sup>1</sup> McCulloch Robertson Lawyers Legal Opinion – Electoral Funding Act 2018 (NSW) Review of the Electoral Funding Act 2018 (NSW) 17 July 2018

<sup>2</sup> This is the enrolment for the previous Council election

<sup>3</sup> The Opinion p4

**This submission rejects this approach.** Additional costs will be incurred where groups conducting a whole of council campaign are also conducting separate ward campaigns. More work is needed to understand these additional costs before providing for higher caps.

This submission is in five parts:

1. Part I examines the **flawed assumptions** underpinning section 31. These include flawed views about the nature of local government and local government election campaigns.
2. Part II provides a **guide to the actual costs of local government election campaigns**, and the numerous factors influencing them.
3. Part III discusses the **numerous flaws** contained in section 31 and the many **discrepancies and anomalies** arising from it.
4. Part IV provides a **case study of election costs**, drawing on the Clover Moore Independent Team's campaign for the 2016 City of Sydney elections.
5. Part V proposes a **new approach** for setting electoral expenditure caps for local government election campaigns and suggests further work is needed before final caps can be set.



## PART I THE FLAWED ASSUMPTIONS UNDERLYING SECTION 31

### A. Three false assumptions

In his second reading speech introducing the Bill, Minister Roberts said of the caps for local government elections:

*“These caps are lower than those applicable to State elections, reflecting the lower number of voters, smaller geographic areas and traditionally much lower spending levels in local government elections.”*

This statement contains three assumptions that cannot be sustained:

- That local government areas have fewer voters than state electorates;
- That local government areas are smaller geographically than state electorates; and
- That the cost of local government election campaigns is lower than individual state electorate campaigns.

Subsequent comments by the Minister revealed incorrect assumptions that the costs incurred in local government election campaigns were limited to printing and newspaper advertising.

#### 1. The ‘fewer voters’ assumption

At the 2016 local government elections, the number of enrolled voters as at August 2016 ranged from 211,267 for Blacktown City Council to 957 for Brewarrina Shire.<sup>4</sup>

The average enrolment for NSW’s 93 State electorates in August 2016 was 55743. Of the 81 Councils holding elections, 15 had enrolments equal to or greater than the average enrolments for state electorates. Two councils (Blacktown and Sutherland) had enrolments more than three times the state average and a further five had enrolments around double the state electorate average.

Both wards of Liverpool Council exceeded the state electorate average by a factor of around 1.2. Enrolments in wards in three other councils were 80 per cent or more of the state electorate average.

Three undivided Councils had enrolments equal to or greater than the state electorate average.

The lowest state electorate enrolment in 2016 was Cootamundra with 53570 voters.

Eighteen councils exceeded this enrolment, and a 19<sup>th</sup> was only 35 votes under. This disparity was even more pronounced at the September 2017 local government elections. At these elections, the number of enrolled voters varied from 250,818 for Central Coast Council to 2,732 for Murrumbidgee Shire.

The average enrolment for NSW’s 93 State electorates in August 2017 was 56,207. The average enrolment of the 46 Councils holding elections was 60,696. Of these, 19 had enrolments equal to or greater than the average enrolments for state electorates. Two councils (Central Coast and Canterbury-Bankstown) had enrolments four times or more than the state electorate average. The enrolments for a further seven was double or more than the state electorate average.

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<sup>4</sup> Data quoted is taken from the NSW Electoral Commission’s website.

Two councils (Blacktown and Sutherland) had enrolments more than three times the state average and a further five had enrolments around double the state electorate average. Five undivided councils had enrolments equal to or greater than the state electorate average.

Enrolments in wards of five councils were 70 per cent of the average state electorate enrolments.

***Given this, it is essential that caps for electoral expenditure are more nuanced in providing for significant variations in council enrolments.***

## **2. The 'smaller areas' assumption**

The assumption is demonstrably false. Councils, like state electorates, vary considerably in geographical size. Local government areas range in size from 6km<sup>2</sup> (Hunters Hill) to 53,511 km<sup>2</sup> (Central Darling Shire). State electorates range in size from 10.3 km<sup>2</sup> (Newtown) to 356,291.7 km<sup>2</sup> (Barwon).

Like state electorates, councils covering small areas are often the most population dense. Similarly, councils covering large areas often have sparse low populations.

Many Councils which exceed the average enrolment for state electorates also cover a larger area than all (or almost all) their overlapping state electorates. For example:

- **City of Sydney** (enrolment 141,369) covers an area of 25km<sup>2</sup>. It overlaps the state electorates of Newtown (10.29km<sup>2</sup>), Sydney (15.9 km<sup>2</sup>) Balmain (16.15km<sup>2</sup>) and Heffron (35.28km<sup>2</sup>)
- **Central Coast** (enrolment 250,818) covers an area of 1,681km<sup>2</sup>. It overlaps the state electorates of The Entrance (124.21km<sup>2</sup>), Terrigal (128.45km<sup>2</sup>), Swansea (191.45km<sup>2</sup>), Wyong (640.55km<sup>2</sup>) and Gosford (867.15km<sup>2</sup>)
- **Lake Macquarie** (enrolment 152,550) covers an area of 531.46km<sup>2</sup>. It overlaps the state electorates of Charlestown (66.18km<sup>2</sup>), Swansea (191.45km<sup>2</sup>) Wallsend (116.83km<sup>2</sup>) and a small corner of Cessnock (4,389.03km<sup>2</sup>).
- **Canterbury-Bankstown** (enrolment 224,592) covers an area of 110.8km<sup>2</sup>. It overlaps the state electorates of Canterbury (18km<sup>2</sup>), Bankstown (23km<sup>2</sup>) East Hills (39.55km<sup>2</sup>), Lakemba (23.7km<sup>2</sup>), Strathfield (22.8km<sup>2</sup>) and Summer Hill (15.9km<sup>2</sup>).
- **Blacktown** (enrolment 211,267) covers an area of 246.9km<sup>2</sup>. It overlaps the state electorates of Blacktown (33.03km<sup>2</sup>), Seven Hills (32.09km<sup>2</sup>), Mount Druitt (38.95km<sup>2</sup>), Riverstone (73.42km<sup>2</sup>), Londonderry (184.74km<sup>2</sup>) and Prospect (70.6km<sup>2</sup>).
- **Shoalhaven** (enrolment 156,108) covers an area of 4567km<sup>2</sup>. It overlaps the state electorates of South Coast (2,799.02km<sup>2</sup>), Kiama (2,275.06km<sup>2</sup>) and Shellharbour (292.39km<sup>2</sup>).
- **Sutherland Shire** (enrolment 165,574) covers an area of 370 km<sup>2</sup>. It overlaps the state electorates of Miranda (38.87km<sup>2</sup>), Cronulla (65km<sup>2</sup>), a small corner of Holdsworthy (130.86km<sup>2</sup>) and part of Heathcoate (407.04km<sup>2</sup>) – the northern part which predominantly takes in the Royal National Park.
- **Northern Beaches** (enrolment 181,978) covers an area of 254km<sup>2</sup>. It overlaps the state electorates of Manly (26km<sup>2</sup>), Wakehurst (40.9km<sup>2</sup>), Davidson (74.71km<sup>2</sup>) and Pittwater (190.16km<sup>2</sup>)
- **Newcastle** (enrolment 117,784) covers an area of 187km<sup>2</sup>. It overlaps the state electorates of Charlestown (66.18km<sup>2</sup>), Wallsend (116.83km<sup>2</sup>) and Newcastle (121.22km<sup>2</sup>).

### 3. The 'lower costs' assumption

This assumption may in part be based on the previous two assumptions – that council areas have fewer enrolments and cover smaller areas than state electorates. As shown above, these assumptions are false for a significant number of councils. This casts considerable doubt over the third assumption: that the cost of local government election campaigns is lower than individual state electorate campaigns.

The Minister provided no evidence for this claim. Indeed, the veracity of this claim can only be tested by examining the actual expenditures incurred by candidates and groups contesting elections. No such examination appears to have occurred.

When concerns about the expenditure caps were raised during the debate on the Bill, the Minister acknowledged it was a complex issue. He however only acknowledged two possible items of campaign expenditure: the cost of newspaper advertisements and printing leaflets. Many other items of campaign expenditure were ignored.

***The full range of campaigning techniques and their costs should be considered in setting appropriate caps for electorate expenditure.***

These are discussed in Part II.

### B. The nature of local government

These flawed assumptions reflect a view of local government that is no longer valid for most people living in NSW. In this view, local government is like a body corporate with limited responsibilities in providing services in common. It is the “roads, rates and rubbish” view of local government. Local government elections are seen as equivalent of the body corporate’s annual general meeting to elect its executive.

This view does not conform with the *Local Government Act 1993*, which embodies the idea that that **elected councils should provide government for their areas**. Chapter 3 of the Act, *Principles for Local Government* states that the object of these principles “... is to provide guidance to enable councils to carry out their functions in a way that facilitates local communities that are strong, healthy and prosperous.”

These principles require councils to:

- provide strong and effective representation, leadership, planning and decision-making.
- strategically plan for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.
- work with others to secure appropriate services for local community needs.

Associated with the “body corporate” view is that councils should function like boards. It is a view that cannot be sustained. Boards meet behind closed doors. Once decisions are made all board members are expected to support them publicly, even if they argued against them within the board meeting.

Part 1 of the Local Government Act requires councils to hold open meetings and to give the public adequate notice of the place and time of meetings and the items to be discussed.

Council business is frequently the subject of public and media debate. Councillors express their views on matters publicly before they are debated at council. Disagreements between councillors are aired publicly and may be reported in the media. Councillors will not always support council’s decisions once they are made and may campaign to reverse them.

**The similarities between councils and parliaments are obvious. This similarity extends to council elections.**

Most council elections, like state and federal elections, are **primarily contests of ideas in which organised political groups put forward competing visions and policy agendas for their council area**. In NSW, these organised groups are predominantly political parties registered for NSW state and/or local government elections.

These groups engage in highly integrated and unified campaigns aimed at getting a group of councillors elected. It is unusual for the individual candidates in a group to run their own individual campaigns separate from the group.

As the table below shows, such whole of council contests was the norm for most NSW electors enrolled to vote for council elections in 2016 or 2017.

	Election year	
	2016	2017
Councils holding elections	81	47
Total enrolments	2,427,605	2,791,997
Council elections with one or more registered parties	28	33
Total enrolments for these elections	1,960,789	2,470,719
Percentage of total enrolments	80.8%	88.5%
Council elections with two or more registered parties	24	30
Total enrolments for these councils	1,850,967	2,465,430
Percentage of total enrolments	76.2%	88.3%
Councils with Labor v Liberal contests	16	25
Total enrolments for these councils	1,569,677	2,379,847
Percentage of total enrolments	64.6%	85.2%
Councils with all ungrouped candidates	37	5
Total enrolments for these councils	256,498	37,517
Percentage of total enrolments	10.6%	1.6%

Significantly, a small percentage of electors were enrolled to vote in elections where all candidates were ungrouped: 10.6 per cent in 2016 and 1.6 per cent in 2017.

As a result of these electoral contests, over 70 per cent of NSW residents are served by elected councils where 50 per cent or more of the councillors were endorsed by registered political parties. A mere 11.28 per cent of residents are served by councils with no councillors endorsed by political parties. See the following table:

% of representation	No of councils	Council population <sup>5</sup>	Percentage of population
Councils with 100% RPP <sup>6</sup> representation <sup>7</sup>	12	2,098,949	28.10%
Councils with 90%+ RPP representation	8	2,892,199	38.73%
Councils with 80%+ RPP representation	21	4,351,871	58.27%
Councils with 70%+ RPP representation	31	4,829,694	64.67%
Councils with 60%+ RPP representation	35	5,261,227	70.45%
Councils with 50%+ RPP representation	39	5,436,601	72.80%
Councils with 40%+ RPP representation	42	5,576,691	74.67%
Councils with zero RPP representation	61	8,422,561	11.28%
<b>All LGAs<sup>8</sup> and total population</b>	<b>128</b>	<b>7,468,261</b>	

Council elections and their outcomes embody Australia's longstanding political culture and democratic practices. Legislation governing council elections should complement this political culture and reinforce these democratic practices. This includes ensuring that political groups engaged in electoral contests are able to adequately resource themselves while not providing unfair advantages to those with access to excessive wealth.

Similarly, political groups must be able to inform voters of their visions and policy agendas and seek their support. Any limits on electoral campaign expenditure must not prevent or inhibit this occurring. Overly restrictive limits risk restricting political discussion and debate.

The expenditure caps set for local government elections do not achieve this objective.

The Legal Opinion addresses the question of whether the expenditure caps are consistent with the implied freedom of communication derived from Australia's constitution. The Legal Opinion notes:

*"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 right. The implied freedom is to be understood in relation to promoting the free flow of information that might influence an elector's judgement and opinion, protecting the information and not the personal right."*

The electoral expenditure caps set out in section 31 significantly restrict "the free flow of information that might influence an elector's judgement and opinion", most notably for those elections involving over three-quarters of NSW's populations.

***For this reason alone, the expenditure caps should be reviewed to ensure they are consistent with the caps imposed for NSW state elections, while considering the diversity of NSW councils.***

<sup>5</sup> Population as at the 2016 census. Includes the unincorporated area

<sup>6</sup> RPP: registered political party

<sup>7</sup> Representation is the percentage of total councillors who were endorsed by a registered political party

<sup>8</sup> Includes Central Darling Shire which is under administration

## PART II THE NATURE AND COST OF ELECTION CAMPAIGNS

Few people become or remain local government councillors or members of parliament without actively campaigning for office. Not campaigning risks creating the impression that voter support is taken for granted.

Campaigns are essential to reach many voters who do not take an active interest in politics, ensure voters are fully informed about a candidate and/or party and counter misinformation from rival candidates and the impact of a hostile mass media.

This is the stuff of an active electoral democracy.

Strongly contested elections at the local level have many common features and challenges irrespective of whether they are for a council or State or Federal Parliament. The major difference is that local council campaigns do not have the overlay of the centralised State and Federal election campaigns. Even so, local campaigns will have some centralised features, particularly for councils divided into wards.

Election day exemplifies these common features. The area outside of a polling place with T-shirted volunteers handing out how-to-vote cards and displays of campaign posters, looks much the same for all elections: local, state and federal.

***A range of factors are driving increases in the costs, including changing demographics, a decline in the use of traditional media as the primary source of information, the increasing influence of online alternatives and the impact of legislative and regulatory requirements.***

Many of these cost drivers are discussed below.

***Electoral expenditure caps must be sufficiently high to ensure local government campaigns can respond to these cost drivers.***

### A. Key campaign elements

#### 1. How to votes

Volunteers handing out how-to-votes are an established feature of Australian elections. Even with parties clearly identified on the ballot paper, many voters still rely on them to guide them to cast their vote quickly and reassure them that they are voting correctly for the candidate or party or their choice.

They are an essential item of campaign expenditure for all serious candidates. Candidates who fail to make how-to-votes available to voters risk a lower vote at the ballot box.

The nature cost of how-to-votes has increased in recent years due to most how-to-votes being A4 size, double-sided, printed in colour on reasonable quality paper.

The A4 size enables how-to-votes to provide all necessary information, including information to conform with legislative requirements. The larger size also ensures the information can be easily read by all voters.

Most parties and candidates are identified with distinctive colours, for example the Labor Party's use of red or the Liberal Party's use of blue. Using these colours helps voters identify the how-to-vote for their preferred candidate or party from the pile they may have been given.

How-to-votes have been printed on both sides at least since the 2016 federal election. The reverse side enables parties and candidates to provide final messages to voters as they wait to vote. No candidate or party will willingly give up this opportunity.

***Electoral expenditure caps must be sufficiently high to enable candidates and parties to print and distribute how-to-votes at elections for all areas in the council and within all wards of a divided council.***

## **2. Posters/corflutes and A-frames**

Campaign posters have been an integral feature of election campaigns since the beginnings of democratic electoral politics in Australia.

Apart from promoting individual candidates and parties, their display throughout an electorate or council area raises awareness of a forthcoming election. On election day, the presence of campaign posters outside a building helps identify that the building is being used as a polling place.

***Electoral expenditure caps must be sufficiently high to enable candidates and parties to mount a poster awareness campaign throughout the whole council area and have a presence at all polling places during pre-polling and on election day.***

## **3. T-Shirts, badges and stickers**

Campaign volunteers wearing T-shirts, badges and stickers, usually in their candidate's/party's distinctive colour, have become a standard feature at polling places. They enable candidates and groups to establish a visible presence and voters to readily identify volunteers for the candidates and groups they wish to support.

Prior to election day, T-shirts, badges and stickers help identify volunteers engaging in campaign activities such as door-knocking.

***Electoral expenditure caps must be sufficiently high to enable campaign volunteers to be easily visible to and identified by voters.***

## **4. Campaign literature**

The campaign leaflet has long been a traditional means for candidates and parties to provide information to voters about themselves, their achievements, policy commitments and vision for the area.

Most candidates and groups will distribute at least one campaign leaflet as part of their campaign.

In many council areas, a single campaign leaflet with a "one-size-fits-all" message is unlikely to include or reach all voters. Leaflets in other languages may need to be printed in Council areas where English is not a first language for many voters. Candidates or groups may need to use leaflets to reach specific cohorts of voters, such as social housing tenants or businesses or to explain their position on issues of concern for voters in a particular locality.

***Electoral expenditure caps must be sufficiently high to ensure that all voters in increasingly diverse communities can be reached and informed during election campaigns.***



## 5. Postage and direct mail

Increasing numbers of voters, particularly in urban areas, now live in secure housing such as multi-storey apartments and gated communities. This has made it impossible for volunteers to distribute campaign literature by letterboxing or doorknocking.

This has presented major challenges in distributing campaign literature.

Candidates and parties must increasingly resort to using Australia Post or other direct mail services, significantly increasing campaign costs.

***Electoral expenditure caps must be sufficiently high to enable local government election campaigns to distribute campaign literature to all voters, including voters who are otherwise inaccessible.***

## 6. Media

There is significant variation in the role of media in election campaigns.

Many regional areas are served by a local newspaper or radio station. While TV programming is largely centralised, regional TV networks are able to broadcast local advertising. Using these media for campaign advertising in these areas may be efficient and cost-effective.

Using radio, television and print servicing greater Sydney is not a practical or cost-effective option for local campaigns in the Sydney metropolitan area. Apart from the high cost of advertising, it is also wasteful as its impact extends beyond the targeted area. Campaigns will vary in their use of local or suburban print media.

Large sections of the community, particularly young people, are increasingly less reliant on traditional media and printed material as primary sources of information. Their preferred sources are online and social media, increasingly accessed through portable devices such as smart phones and tablets.

Political campaigns, including local government election campaigns, have had to adjust to this. Failing to do so risks not reaching and informing a significant group of voters.

***Electoral expenditure caps must be sufficiently high to enable local government election campaigns to use the most appropriate media to inform all voters, including voters who cannot be reached by traditional campaigns or media.***

## 7. The campaign office

Not all local government election campaigns have campaign offices. Independent candidates seeking election as ward councillors for small rural councils can easily run their campaigns from home. Campaigns for larger council areas may establish campaign offices as a base for our campaign operations, a workspace for our volunteers and a storage space for campaign materials.

Establishing a campaign office may be unavoidable for councillors seeking re-election, particularly in larger council areas.

Paragraph 7.16 of the *Model Code of Conduct for Local Councils in NSW* states:

*You must not use council resources, property or facilities for the purpose of assisting your election campaign or the election campaign of others unless the resources, property or facilities are otherwise available for use or hire by the public and any publicly advertised fee is paid for use of the resources, property or facility.*



A campaign office helps councillors seeking re-election avoid any suggestion that they are acting contrary to the Model Code.

If a campaign office is established, it must be paid for at market rates.

Section 47 of the *Electoral Funding Act* states:

- (1) *It is unlawful for a person to make any of the following indirect campaign contributions to a party, elected member, group or candidate:*
- (a) *the provision of office accommodation, vehicles, computers or other equipment for no consideration or inadequate consideration for use solely or substantially for election campaign purposes,*

The establishment of a campaign office will increasingly become an unavoidable and necessary electoral expense for many campaigns.

***Electoral expenditure caps must be sufficiently high to enable local government election candidates, and particularly councillors seeking re-election, to rent campaign office space at market rates.***

## **B. Variations and changes in costs**

Costs of local government election campaigns vary by location. For example, commercial office space in central Sydney is more expensive than in regional areas. Similarly, advertising can be more expensive in metropolitan media than regional media.

***Electoral expenditure caps should be sufficiently high to allow for these variations.***

Schedule 1 of the *Electoral Funding Act 2018* links increases in electoral expenditure caps to the Consumer Price Index. The basket of goods which are the basis of the Consumer Price Index contain virtually no items relevant to election campaigns. Accordingly, it is an inadequate measure for determining increases in the cost of election campaigns.

***This submission argues that expenditure caps should be based on an understanding of the actual costs of election campaigns. Similarly, the method for determining increases in caps should be based on the way these costs increase.***

## **C. Real costs and Section 31**

Part IV provides an understanding of actual campaign costs with a case study of campaign expenditures incurred in one local government area, the City of Sydney, drawing on campaign expenditures incurred by the Clover Moore Independent Team.

This case study demonstrates how the various cost drivers identified above impacted on the costs of this campaign. These factors will influence the costs of local government election campaigns in many other areas, particularly local government areas with:

- large populations and enrolments;
- dense urban populations, with a significant proportion of residents living in secure multi-storey apartment blocks;
- culturally, socially and/or economically diverse populations; and/or
- a strong tradition of elections being contested by rival political parties.

### PART III SECTION 31 AND ITS FLAWS

Section 31 of the Electoral Funding Act 2018 sets out the electoral expenditure caps for candidates and parties contesting local government elections.

Part I has shown that these caps are based on flawed assumptions about local government elections. The amount of the caps is too low to accommodate the full range of expenditures identified in Part II. The case study in Part IV will provide a practical demonstration of their inadequacy.

Section 31 specifies **16 separate expenditure caps** which are set using variables including:

- whether or not candidates are endorsed by a registered political party;
- whether candidates are grouped or ungrouped;
- whether candidates are contesting an election for an undivided council or a ward election in a divided council;
- whether candidates are contesting a councillor or direct mayoral election; and
- whether the number of enrolled voters for the council area at the previous election was above or below 200,000.

These 16 expenditure caps ignore the reality that most local election campaigns are highly integrated, even where multiple wards are being contested by the one party or group.

In councils where the Mayor is directly elected, each party or group will generally run a single unified campaign, focused on the Mayoral candidate, aimed at getting the mayoral candidate and the councillor team elected.

The Legal Opinion notes that, in practice section 31:

- (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.*

The Legal Opinion suggests more candidates will be encouraged to run for Mayor to take advantage of the higher cap.

This submission will not repeat the Legal Opinion's detailed analysis of this issue and other concerns about section 31 and instead commends it to the Committee.

#### A. Lack of Clarity

Section 31 presents **challenges in determining which caps should apply.**

For example, in the case of registered political parties contesting an election for a single undivided council area<sup>9</sup> such as the City of Sydney<sup>10</sup> the expenditure caps are:

- \$5,000 for parties: in the case of the City of Sydney, this equates to \$0.03 per voter.
- \$30,000 for "groups of candidates" endorsed by a party and "ungrouped mayoral candidates": in the case of the City of Sydney, this equates to \$0.21 per voter.

<sup>9</sup> No undivided council will qualify for the higher caps applying to councils where enrolments exceeded 200,000 at the previous election.

<sup>10</sup> These are the most relevant caps for City of Sydney elections: In 2008, 2012 and 2016 almost all candidates were endorsed by a registered state or local government political party.

- \$20,000 for “party (ungrouped) candidates”: in the case of the City of Sydney, this equates to \$0.14 per voter.
- \$15,000 for “grouped mayoral candidates”: in the case of the City of Sydney, this equates to \$0.10 per voter.

If a candidate is running for both Mayor and Councillor the mayoral cap applies.

**It is unclear whether the cap for a party endorsing candidates is \$5,000 or \$30,000, whether the party and the group are subject to separate caps, or whether this prevented by section 32 dealing with aggregated expenditure.**

**It is unclear what is meant by “grouped” and “ungrouped” mayoral candidates.**

Mayoral elections are conducted separately with their own ballot paper. They nominate as individuals, irrespective of whether they have party endorsement.

The higher cap for mayoral contests creates a **perverse incentive for candidates to run for Mayor** to benefit from the higher allowable expenditure.<sup>11</sup>

The apparently higher caps for ungrouped candidates may also create a **perverse incentive for candidates not be grouped**. Abandoning groups on the ballot paper would pose a significant threat to the electoral system. An overwhelming majority of voters (generally exceeding 90 per cent) vote for grouped candidates “above the line” because it is quick and easy. This also enables an efficient and timely counting of votes and delivery of a result.

Inadvertently **encouraging a de facto return to below the line voting** (because of candidates not forming groups) would significantly disadvantage voters, increase informal voting and significantly delay the count.

***This submission requests that the Inquiry give serious consideration to these concerns.***

## **B. A flawed two-tier system**

Section 31 sets slightly higher caps for council areas where the number of enrolled voters at the previous election exceeded 200,000. There is no consistency in the amount of the increase, as is shown by the table below:

Expenditure Cap for enrolments under 200,000	Expenditure Cap for enrolments over 200,000	Amount of increase in cap	% Increase
\$1,5000	\$20,000	\$5,000	33%
\$20,000	\$25,000	\$5,000	25%
\$30,000	\$35,000	\$5,000	17%
\$30,000	\$40,000	\$10,000	33%
\$40,000	\$45,000	\$5,000	33%

At the next council elections in 2020, the higher caps will only apply in three council areas:

- Central Coast (250,818 enrolled voters):
- Canterbury-Bankstown (224,592 enrolled voters)
- Blacktown (211,267 enrolled voters)

Each of these council areas are divided into five wards, thus the actual caps will range from \$100,000 to \$225,000 depending on which category applies.

<sup>11</sup> See Legal Opinion page 9 at paragraph 3.46.

**In contrast, the City of Sydney, which has two-thirds of Blacktown's enrolment, is only entitled to caps ranging from \$15,000 to \$40,000 which equates to 15 per cent - 17.7 per cent of Blacktown's permissible cap.**

### **C. Significant discrepancies within the first tier – Councils with under 200,000 voters**

Applying the same expenditure caps for all councils with voters under 200,000 creates significant anomalies. The submission commends the extensive analysis of these anomalies in the Legal Opinion to the Inquiry.

These anomalies are compounded by additional provisions applying to councils divided into wards. The Act also provides separate caps where councils are divided into wards, with the expenditure caps for each ward campaign being the same as caps for undivided councils.

**Thus, the City of Sydney (with 141,369 enrolled voters in 2016) will be subject to the same caps as will apply for the undivided Brewarrina Council with 957 voters and C Ward of Warren Shire Council with 508 voters.**

The extent of these discrepancies is shown by applying the applicable caps in section 31 to the 2016 local government elections. These discrepancies are widened by the nature of the political contests.

At the City of Sydney elections in 2016 almost all candidates were endorsed by a registered political party. If the applicable cap was \$30,000 (ie party endorsed candidates nominating as a group), the allowable expenditure would have been **\$0.21 per voter**.

In Brewarrina in 2016 all candidates ran as ungrouped independents. The applicable expenditure cap would have been \$25,000. Thus, the allowable expenditure would have been **\$26.12 per voter**.

In C Ward of Warren Council, five candidates ran as ungrouped candidates. The applicable expenditure cap would have been \$25,000. Thus, the allowable expenditure would have been **\$49.21 per voter**.

### **D. Divided versus undivided councils**

Over 75 per cent of voters experience election campaigns for the whole of their local council, irrespective of whether it is divided into wards.

Yet section 31 gives a significant and unfair advantage to campaigns for divided councils. This arises because allowable expenditure is multiplied by the number of wards. The more wards, the higher the expenditure cap.

There is some justification for higher expenditure caps. A group conducting a whole of council campaign will have additional costs for their separate ward campaigns. These may be basic as the extra costs of printing separate how to vote cards, posters and leaflets in lower numbers for each ward.

It is questionable however whether these additional costs should be three, four or five times greater than a whole of council campaign for an undivided council.

The approach adopted in section 31 creates **significant discrepancies**. For example, Liverpool Council, divided into two wards, had 130,536 voters at its last election in 2016. The expenditure cap for a party group is **\$60,000**.

Inner West Council, divided into five wards, had 130,677 voters at its first election in 2017 – 141 more voters than Liverpool. The expenditure cap for a party group is however **\$150,000**, 2.5 times more than the Liverpool expenditure cap.

At the 2017 council elections, Waverley Council, with an enrolment of 45,795 voters had 5,071 voters more than Woollahra Council. Waverley is divided into four wards, allowing for an expenditure cap for a party group of **\$120,000** whereas Woollahra, divided into five wards, is allowed an expenditure cap of **\$150,000**.

## **E. Behind the flaws**

The multiple flaws in section 31 arise from failures to:

- to **consider the significant variations in enrolments** in NSW councils;
- understand the **nature of local government election campaigns**;
- understand the **actual costs and cost drivers** of election campaigns; and
- consider the **impact and implications of the way electoral expenditure caps are to be calculated**.

Part IV provides some insight into actual campaign costs, and their cost drivers, and Part V suggests a new approach.

## PART IV      CONTESTING ELECTIONS IN THE CITY OF SYDNEY

### A CASE STUDY

#### **A. The Context: Local democracy in the City of Sydney**

For over a century organised political groups have endorsed candidates for City of Sydney elections.

In 1909, six Australian Labor Party candidates were elected, and this increased to 11 in 1915. In 1918 a Civic Reform Committee endorsed 14 candidates to oppose the Labor Party at that year's elections. This led to a permanent Citizen's Reform Association (later Civic Reform) being established in 1920<sup>12</sup>.

This set the pattern for local democracy in the City of Sydney for the next century. While the groups themselves have changed<sup>13</sup>, council elections have been contests between organised political groups with competing policy agendas and alternative visions for the City.

Election campaigns have strongly resembled parliamentary elections and the elected council has functioned much like a parliament rather than a board. Indeed, for much of the 20<sup>th</sup> century the Town Hall's council chamber closely resembled a parliamentary chamber with its elevated Lord Mayoral chair, large central table and a horseshoe shaped backbench.

Electoral democracy in the City of Sydney has been in part shaped by the cultures and traditions of the various competing groups and in part by the history, nature and significance of the City itself as a major centre of government, business, employment, culture and tourism. The NSW Local Government Remuneration Tribunal acknowledges this significance by giving the City the unique category of "Principal CBD", stating:

*"The Council of the City of Sydney (the City of Sydney) is the principal central business district (CBD) in the Sydney Metropolitan area. The City of Sydney is home to Sydney's primary commercial office district with the largest concentration of businesses and retailers in Sydney.*

*"The City of Sydney's sphere of economic influence is the greatest of any local government area in Australia.*

*"The CBD is also host to some of the city's most significant transport infrastructure including Central Station, Circular Quay and International Overseas Passenger*

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<sup>12</sup> Golder, Hilary Sydney's Electoral History: A Short Electoral History of Sydney City Council 1842-1992, 1995 p38-39.

<sup>13</sup> Labor has endorsed candidates at every City Council election since 1909.

In the early 1980s the Civic Reform Association amalgamated with the Liberal Party, an arrangement that continued until the Council was dismissed in March 1987. In 1988, *City of Sydney Act* carved up the council area, establishing a small City of Sydney covering the CBD, Pyrmont and Ultimo and a new City of South Sydney covering the remaining area. Civic Reform re-established itself to contest the 1988 and 1991 City of Sydney elections. It subsequently imploded after the 1991 elections when a Civic Reform alderman voted against the Civic Reform Lord Mayoral candidate, instead supporting Independent Frank Sartor.

Sartor, first elected as an Independent in 1988, subsequently established Living Sydney as a registered local government political party to contest the 1995 and 1999 City of Sydney elections.

Kathryn Greiner, elected as a Liberal aligned Independent in 1995 subsequently established the Sydney Alliance as a registered local government political party to contest the 1999 City of Sydney elections.

Labor contested all South Sydney Councils from 1988 until the Council was amalgamated with the City of Sydney in 2004. The Liberal Party and the Greens both contested the 2000 South Sydney Council elections, each electing one councillor.

Labor, Liberal and The Greens have contested every City of Sydney election since the 2004 amalgamation. Following these elections The Clover Moore Independent Team was registered as a local government political party and subsequently contested the 2008, 2012 and 2016 City of Sydney elections.



*Terminal. Sydney is recognised globally with its iconic harbour setting and the City of Sydney is host to the city's historical, cultural and ceremonial precincts. The City of Sydney attracts significant visitor numbers and is home to 60 per cent of metropolitan Sydney's hotels.*

*"The role of Lord Mayor of the City of Sydney has significant prominence reflecting the CBD's importance as home to the country's major business centres and public facilities of state and national importance. The Lord Mayor's responsibilities in developing and maintaining relationships with stakeholders, including other councils, state and federal governments, community and business groups, and the media are considered greater than other mayoral roles in NSW."<sup>14</sup>*

**Determining how the elected Council and its Lord Mayor will meet its responsibilities and set the City's direction to ensure it maintains its significance has been at the centre of every electoral contest for more than a century.**

## **B. Democratic electoral contests: The cost drivers**

The City of Sydney has been an undivided Council since 2004, a decision confirmed by 58.04 per cent of voters in a local government constitutional referendum in 2008.

***Groups and candidates must campaign for election across the whole of the City of Sydney area. The City of Sydney's demographics, unique non-residential franchise and the nature of its housing stock create complex challenges which strongly influence the cost of election campaigns.***

### **1. Challenges in communicating with eligible voters**

Election campaigns must engage with all eligible voters if they are to be effective. In the City of Sydney however it is near impossible to identify who is actually eligible to vote. This adds to the cost of election campaigns.

***Difficulty in identifying residential voters:*** The 2016 Census (conducted a month before the 2016 City of Sydney elections) found that the City of Sydney had a residential population of 208,374. Only 118,397 residents were enrolled to vote. The residential population aged 20 and over (ie of voting age) was 185,965.

Compounding this is the large number of visitors to the City each day. In 2017 approximately 1,002,026 people visited the City each day comprising 386,700 non-resident workers, 582,800 day visitors and 32,526 overnight visitors.

***Difficulty in identifying non-residential voters:*** In 2016, 22,972 non-residents were enrolled for the City of Sydney elections. These comprised a mixture of ratepaying landowners and occupiers (generally persons and corporate entities who rented premises for business purposes). Enrolled occupiers were however only a proportion of all businesses operating in the city. Election campaigns must therefore target all businesses as it is near impossible to identify those businesses represented on the roll.

***Electronic roll of little practical benefit:*** The NSW Electoral Commission provides candidates with an electronic copy of the electoral roll. This roll is generally received late in the campaign. While the roll includes non-residential voters, it does not provide their usual contact addresses and a large majority of this correspondence ends up 'return to sender'. By their nature, many of these non-residential voters are inaccessible in any other way.

<sup>14</sup> Local Government Remuneration Tribunal *Annual Report and Determination* under sections 239 and 241 of the Local Government Act 1993 17 April 2018 page 19

## 2. A highly transient area

***The City of Sydney has a high turnover in its residential population. This means that candidates and groups, including well-established candidates and groups, cannot rely upon established reputations, profiles or past campaigns. Each election campaign must be fresh, influencing their cost.***

The 2016 Census showed the extent of the turnover of the City's residential population:

- one-third (32 per cent) of residents moved into the City in the previous year; made-up of 69 per cent from other parts of Australia and 31 per cent from overseas; and
- two-thirds (68 per cent) of residents moved into the City in the previous 5 years; made-up of 57 per cent from other parts of Australia and 43 per cent from overseas.

## 3. A highly diverse area

***The City of Sydney is a culturally and socially diverse electorate with significant disparities in income and housing. Election campaigns must respond to this diversity. Campaigns solely relying upon "one-size-fits-all" messages will not be successful. Effectively targeting campaign messages adds to the cost of campaigns.***

**Cultural diversity:** The City's population is culturally and linguistically diverse and becoming more so:

- 54.9 per cent were born overseas in 2016 compared to 46.1 per cent in 2006
- 41.3 per cent speak a non-English Language, compared to 31.7 per cent in 2006
- There are 96 non-English languages spoken, not including languages spoken by fewer than 10 People.

The City has a significant Chinese population with 26.1 per cent of people born in China.

**Significant economic disparity:** There are significant disparities in individual and household incomes within the City of Sydney:

- Nearly 40 per cent of residents (aged 15+) receive an income which is in the top quartile (25 per cent) of NSW State incomes
- Over 20 per cent (21.7 per cent) of residents receive an income in the lowest quartile of NSW incomes.

These are the two largest quartile groupings – with low-income earners having increased 14,556 (67.7 per cent) and high-income earners by 21,260 (47.5 per cent) since 2006.

This same income disparity is also reflected in household income statistics:

- Over one-third (34.5 per cent) of households receive income in the top quartile (25 per cent) of NSW incomes.
- Over one-in-five (22.8 per cent) receive income in the lowest quartile of state household incomes
- Since 2006, those in the lowest income group have grown by almost half (49.2 per cent), and those in the highest quartile by 37.6 per cent
- The largest growth has been in the medium –highest group which has grown by over 8,000 households or 67.3 per cent.

**Diversity in housing types:** The City's residents are a diverse mix of home-owners and renters:



- 64.5 per cent are renters, of which 55.3 per cent rent privately and 9.2 per cent are social housing tenants.
- 34.8 per cent either own or are purchasing their home.

There are significant differences between household patterns in the City of Sydney compared to greater Sydney. The 2016 census showed 55 per cent of households in the City of Sydney were rented compared to 32.6 per cent in greater Sydney.

This comprised:

- 47.3 per cent privately rented households compared to 27.6 per cent for greater Sydney
- Eight percent social housing households compared to 4.6 per cent for greater Sydney.

Conversely home ownership is much lower in the City of Sydney, with only 30.1 per cent of households being owned or purchased, compared to 59.2 per cent for greater Sydney.

**Age range:** The City of Sydney has a higher percentage of persons under the age of 30 than greater Sydney: 42.4 per cent for the City of Sydney compared to 35.7 per cent for greater Sydney at the 2016 Census. The disparity is greater for persons aged under 40: 67.1 per cent compared to 55.1 per cent.

This disparity is greatest for persons aged 15-29 (ie people who will be of voting age at the 2020 local government elections): 39.6 per cent compared to 20.9 per cent.

A similar disparity exists at the other end of the age scale: only 8.2 per cent were aged 65 and over in the City of Sydney compared to 13.9 per cent for greater Sydney.

#### **4. An increasingly inaccessible area**

As of June 2018, 80,426 residential dwellings are in secure multi-storey apartment blocks. This is almost three-quarters (74.6 per cent) of all dwellings within the City of Sydney. The number of secure multi-unit dwellings is expected to significantly increase over the next five years by a further 23,500 dwellings. A further 1,631 other dwellings are predominantly located above shops and are similarly inaccessible.

A further 7,900 social housing dwellings are in multi-unit blocks and these are increasingly being made secure.

Conversely there are only 21159 owned detached and terrace houses within the City of Sydney, comprising 19.7 per cent of all dwellings. This includes 2036 social housing dwellings.

***The increasingly high number of secure dwellings has made it near impossible to reach voters using traditional campaign methods such as letterboxing by volunteers and door knocking. This has significantly increased the cost of election campaigns due to the need to use direct mail services and other methods of communication.***

### **C. The impact of cost drivers: 2016 City of Sydney election**

The factors outlined above have strongly influenced expenditures incurred by its 2016 City of Sydney election campaign.

#### **1. Polling day and the lead-up to polling day**

There were 38 polling places and four locations for pre-polling for the 2016 election. A campaign requires a strong and visible presence at each booth, with enough how-to-votes for the 141,369 people enrolled to vote. Posters help inform voters of the election.

The total cost of these campaign items – how-to-votes, posters, T-shirts, badges, stickers – was \$41,026.24. This equates to an expenditure of \$0.29 per voter (***more than the current cap***).

The Clover Moore Independent Team rented office space at market rates to provide a base for our campaign operations and a workspace for our volunteers.

Campaign office rent for the period 1 July 2016 to election day, 10 September 2016 was \$6,600. This is the equivalent of \$0.08 per voter.<sup>15</sup>

***The applicable expenditure cap would not permit these basic campaign expenditures.***

## **2. Communicating with the diverse City of Sydney electorate**

Election costs are affected by the diverse nature of the City of Sydney area. In 2016, this diversity increased with the inclusion of 22,972 non-resident voters (predominantly landowners and business people) on a roll totalling 141,369.

Direct contact with voters through door knocking, street stalls and similar activities are standard campaigning activities, requiring informative campaign material for distribution.

In 2016 printed material used in the campaign comprised just two leaflets distributed to all City voters, with additional material for non-residential voters and other key groups, including material in languages other than English.

The total costs of these items at the 2016 City of Sydney elections was \$95,432.55 which equates to \$0.68 per voter (***over three times the current cap***).

It is no longer possible to reach most City of Sydney residents through traditional campaign activities such as letterboxing and door knocking by volunteers. This has necessitated the use of mail services to distribute our two principal campaign brochures. Similarly, the 22,972 non-resident voters could only be reached directly by mail.

***The current cap could be completely expended by just one campaign flier printed and sent to all enrolled voters at the Australia Post cheap unaddressed mail rates.***

In the period 1 July 2016 to election day, 10 September 2016 (the period that would be subject to an expenditure cap) the Clover Moore Independent Team spent \$87343.18 on postage. This is equivalent to \$1.62 per voter.<sup>16</sup>

As noted in Part II, many voters no longer rely on traditional media or printed material as primary sources of information, leading to new costs for online campaigning and social media to reach these voters.

## **3. Overall campaign costs**

The various costs outlined above come to a total of \$2.77 per voter, including administrative and office costs and transportation, not allowing for unforeseen costs or contingencies.

**With these considered, the real cost per voter is around \$3.00, which aligns closely with the amount that Parliament identified and set for station election spending caps. The current local government cap is will make campaigning impossible in many large council areas.**

<sup>15</sup> Calculated by dividing \$6,600 by 141,369, the total number of enrolled voters.

<sup>16</sup> Calculated by dividing 87343.18 by 141,369, the total number of enrolled voters.

## **PART V      AN ALTERNATIVE APPROACH TO ELECTORAL EXPENDITURE CAPS**

For most NSW voters, there is little real difference between election campaigns for local, state or federal government. Campaigns at the local level for all three levels of government have common elements, require similar resourcing, have similar cost drivers and, as a result, incur similar levels of expenditure.

**Caps on electoral expenditure should recognise this and should reflect the democratic reality for most NSW voters.**

Given the similarity between local and state electoral costs for many voters, the electoral expenditure caps for state elections should be a starting point in setting caps for local government elections.

### **A. State election caps**

Section 29 of the *Electoral Funding Act 2018* uses state electorates as the basis of setting expenditure caps.

#### **1. Registered political parties**

Registered political parties may spend up to \$122,900 for each electorate in which they endorse candidates, if candidates are endorsed for more than 10 electorates. The maximum amount a party can spend is \$11,429,700 that is \$122,900 multiplied by 93, the total number of state electorates.

There is also a cap of \$61,500 on the amount a party can spend on the campaign within each electorate. This involves expenditure on campaign materials which:

- explicitly mentions the name of a candidate in the election in that electoral district or the name of the electoral district, and
- is communicated to electors in that electoral district, and
- is not mainly communicated to electors outside that electoral district.<sup>17</sup>

This means registered parties are able to spend at least \$5,710,200 on their statewide election campaigns. In reality, they are likely to spend more on the statewide campaign, as local campaign expenditure is likely to be considerably lower in electorates which the party has little chance of winning or losing.

#### **2. Independent candidates**

Independent candidates have a higher expenditure cap of \$184,000. This higher cap reflects the fact that an Independent candidate's campaign is restricted to a single electorate. Their campaigns are not reinforced by the messaging of statewide campaigns or the benefits of established party name recognition.

Independent candidates do not have the same administrative and campaign support or as party candidates, do not enjoy other campaigning advantages such as economies of scale in dealing with suppliers. Such economies of scale include access to bulk prices for printing and purchase of electoral collateral such as T-shirts and the ability to reuse collateral for elections campaigns for all levels of government.

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<sup>17</sup> *Electoral Funding Act 2018*, s29 (13).

### 3. Providing for equity

Section 21 (1) (a) of the *Electoral Act 2017* effectively requires the number of voters in each electorate to be equal on a date set out in the Act, within a margin of 10 per cent. This date is four years from the day of the return of the writs for choosing the Assembly that exists at the time an electoral redistribution is carried out.

As at August 2018, enrolments for NSW electorates ranged from 53,468 for Granville to 67,875 for Camden. The average enrolment for all NSW electorates was 56,475. All electorates except for Shellharbour, Londonderry and Camden were within the 10 per cent margin.

The requirement of an approximate equality of voters for all electorates ensures an approximate equality in the amount parties and independent candidates can spend per voter. This difference in allowable expenditure for political parties ranges from \$1.81 to \$2.30 per voter<sup>18</sup>, a difference of \$0.49. For Independent candidates it ranges from \$2.71 to \$3.44 per voter, a difference of \$0.73.

These differences are due to a small group of electorates with particularly high enrolments. In the case of parties, for 88 electorates the difference in expenditure allowable per voter is less than \$0.25. For Independent candidates the difference is \$0.25 or less for 80 electorates.

Based on the average electorate enrolment, the expenditure cap per voter for political parties is \$2.18 and \$3.26 for Independent candidates. In 27 electorates, political parties would be able to spend \$0.5 or more per voter than the average. In 16 electorates, parties could spend \$0.5 or less per voter than the average. Independent candidates could spend between \$0.5 and \$0.18 more per voter than the average in 39 electorates. They could only spend between \$0.5 and \$0.55 less per voter than the average in 23 electorates.

#### **B. A new formula for local government electoral expenditure caps**

**The rough equality in the caps on electoral expenditure for state electorates derives from the approximate equality in enrolled voters for state electorates. It also enables the calculation of roughly equal caps per voter.**

**Given the significant differences in local government area enrolments, an expenditure cap formula based on allowable expenditure per enrolled voter would be a fairer approach than caps based on two or more crudely set tiers.**

The caps per voter for state election campaigns should guide the caps for voter for local government election campaigns given their similarity.

**The principle behind different caps for parties and Independent candidates at the state level should apply in determining appropriate caps for local government elections. The state caps recognise the difference in costs in campaigning for election in one electorate compared to multiple electorates.**

Accordingly, registered parties (whether local or state) endorsing candidates for more than one local government area should have a lower expenditure cap than parties, groups or candidates seeking election in one local government area.

**The appropriate higher cap for single council election campaigns should be approximately the same as the cap for Independent candidates at state elections. Based on 2018 enrolments, this would be around \$3.25 per voter. This cap should be the same for local government political parties, state parties contesting only one**

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<sup>18</sup> Calculated according to electorate enrolments.

### **council area, non-party candidates seeking election as a group and ungrouped candidates.**

The cap for multiple council election campaigns should be slightly less in recognition of economies of scale enjoyed by such campaigns. It should not be as low as the party cap for state elections, given the absence of the benefits of a statewide campaign. Perhaps the most appropriate cap would be the halfway point between the cap per voter for Independent candidates and state parties. This would mean a cap of around \$2.70 per voter.

**Adopting this approach may adversely impact on candidates contesting elections in council areas with low enrolments.** For example, under this formula a candidate or group nominating in Brewarrina Shire with only 957 voters would only be able to spend \$3,110.15. This may not be enough for a candidate to meet basic campaign costs such as printing how to vote cards, posters and a campaign leaflet.

There needs to be further consideration of setting higher overall caps for council areas with low enrolments. This would need to consider the likely indicative costs of conducting election campaigns in these areas.

## **1. Divided councils**

The above approach is applicable to undivided councils. There will however be additional campaign costs where groups are conducting a whole of council campaign and the council is divided into wards. These will be as basic as the costs of printing separate how to vote cards, posters and leaflets for each ward.

This should be recognised in the expenditure caps. The quantum of the caps should be based on whether the campaign is for the whole council area, or for a single ward within the council area. Where the campaign is for a single ward, the appropriate cap may be the applicable dollar per voter cap. This could be a higher cap for wards where the number of voters would mean the cap would be too low to allow for an effective campaign.

Where a campaign is for the whole council area, there should be an increase in the cap to allow for the additional expenditure incurred within each ward. This cap should realistically reflect the likely additional costs of ward campaigns. More work is required to understand the extent of these additional costs.

## **C. The way forward**

Part V of this submission has provided a new approach for setting expenditure caps for local government election campaigns. More work is needed before new expenditure caps are set.

This includes research to understand the legitimate and realistic costs of local government election campaigns and the impact of expenditure caps on councils depending on the size of their enrolments.

***While ensuring that expenditure caps do not prevent democratic electoral contests, they must be set at a level where parties, groups or candidates have an unfair advantage solely based on their greater access to financial resources.***

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## Legal opinion – Electoral Funding Act 2018 (NSW)

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### Review of the Electoral Funding Act 2018 (NSW)

Dated: 17 July 2018

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# Legal opinion

## Electoral Funding Act 2018 (NSW)

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### Background

#### 1 Electoral Funding Act 2018 (NSW)

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- 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

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- 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

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- 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 proceeding 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 Constitution<sup>1</sup>. 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 right<sup>2</sup>. The implied freedom is to be understood in relation to promoting the free flow of information that might influence an elector's judgement and opinion<sup>3</sup>, 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;

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

<sup>2</sup> *Unions NSW v New South Wales* [2013] HCA 58 [36]

<sup>3</sup> *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.*”<sup>4</sup> 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.”*<sup>5</sup>
- 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.

<sup>4</sup> *Unions NSW v New South Wales* [2013] HCA 58 [7]

<sup>5</sup> *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 limb<sup>6</sup>.
- 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 government<sup>7</sup>. 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 government<sup>8</sup>. 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:

<sup>6</sup> *Unions NSW v New South Wales* [2013] HCA 58 [40]

<sup>7</sup> *Unions NSW v New South Wales* [2013] HCA 58 [44]

<sup>8</sup> *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."<sup>9</sup>*

- 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."*

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<sup>9</sup> 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**

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- 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**

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- 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 Committee's 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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**Patrick Holland**

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