

**Submission  
No 20**

## **ADMINISTRATION OF THE 2019 NSW STATE ELECTION**

**Organisation:** Unions NSW

**Date Received:** 14 October 2019



## Unions NSW Submission

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## Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with over 65 affiliated trade unions and Trades and Labour councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce.
2. Unions NSW welcomes the opportunity to make a submission to the Inquiry into the 2019 State Election. Unions NSW commentary to this submission is focussed on the role of third-party campaigners in election campaigns.
3. Unions NSW and its affiliated unions have a proud history of engaging in electoral politics to represent the interests of union members. In the 2019 state election, Unions NSW and a number of affiliated unions ran third-party campaigns.
4. Unions NSW has also been an active voice on the importance of third-party campaigners in the electoral process. In December 2018 Unions NSW and a number of affiliated unions successfully challenged electoral expenditure caps placed on third-party campaigners in *the Electoral Funding Act 2018*.
5. Unions NSW opposes any reforms that would further restrict the campaign activities of third-party campaigners. Unions and other third-party campaigners, including churches, community organisations and environmental groups play a legitimate and crucial role in electoral campaigning and holding governments (and potential governments) accountable.

## The Unions NSW campaign

6. Unions NSW was a registered third-party campaigner in the 2019 state election. The Unions NSW campaign was focussed on the lack of investment in growth and job creation in Western Sydney and regional NSW. The campaign was informed by the experience of union members in NSW who believed their local areas were being neglected, ignored and/or forgotten.

The key issues Unions NSW campaigned on were:

- The mismatch of development and infrastructure funding and projects across the state especially between urban and regional areas;

- The uneven burden of population growth and lack of funding for infrastructure and resources particularly in key urban areas across the state;
  - The lack of investment in regional NSW to create jobs and economic growth;
  - The failure to determine funding priorities based on need and economic development particularly in decisions such as investing in Sydney stadiums instead of schools and regional infrastructure.
7. The Unions NSW campaign involved union members talking to workers and their families in local communities about the issues important to them at the election. Campaign activities included door knocking, phone calling union members and running street stalls. The Unions NSW campaign was also promoted through social media, radio advertisements and advertisements on on-demand television.
8. Unions exist to represent and advance the interests of working people through collective action. The interests of workers are inextricably linked to the Government of the day and their legislative and policy agendas. The NSW Government is the largest employer in the State and Government policies impact the wages and conditions of union members. Government decisions also impact on accessibility to education, healthcare and other government services for workers and their families. Other key issues include transport planning decisions and their impacts on workers daily commutes, housing affordability and urban planning.
9. Working people have always pooled their economic resources to enable them to participate in the political and electoral processes. Individual workers do not have the financial resources of an AMP or a Commonwealth Bank or Malcolm Turnbull for to fund political advocacy. This is why union members pool their resources in order to participate in the democratic processes in NSW and across Australia.
10. Governments are most accountable to their electors in the lead up to elections. As such, Unions take an active role in campaigning around key issues during this period. Third-party campaigners, particularly those organisations representing a broad membership base, are a central tenant of the democratic electoral process.

## High Court Case and Third-Party Expenditure Caps

11. In May 2018, the NSW Government passed the *NSW Electoral Funding Act 2018* (the Act) which repealed and replaced the *Election Funding, Expenditure and Disclosure Act 1981*. The Act placed restrictions on the expenditure and actions of third-party campaigners in the lead up to state and local government elections.
  
12. The two elements of the legislation of significant concern to Unions NSW were:
  - halving of the third-party campaign expenditure cap from \$1,050,000 to \$500,000 for campaigners registered before October 2018<sup>1</sup>; and
  - restrictions on third party campaigners from ‘acting in concert’. That is, it was unlawful for two or more campaign organisations to co-ordinate campaigns where the combined expenditure was in excess of the new legislative cap<sup>2</sup>.
  
13. Unions NSW lodged a joint High Court challenge to the legislation in conjunction with the following parties:
  - Australian Salaried Medical Officers' Federation (New South Wales) (ASMOF);
  - Australian Services Union New South Wales & ACT (Services) Branch (ASU);
  - Development and Environmental Professionals' Association (DEPA);
  - Electrical Trades Union of Australia New South Wales Branch (ETU);
  - Health Services Union NSW (HSU);
  - New South Wales Independent Education Union (IEU);
  - New South Wales Nurses and Midwives' Association (NSWNMA);
  - Australian Education Union New South Wales Teachers Federation Branch (NSWTF);
  - The Association of Professional Engineers, Scientists and Managers, Australia (NSW Branch) (APESMA);
  - Public Service Association of NSW (PSA);
  - Rail, Tram and Bus Union of New South Wales (RTBU);
  - Shop, Distributive and Allied Employees' Association, New South Wales (SDA NSW)
  - Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern, New South Wales (SDA NN); and

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<sup>1</sup> Electoral Funding Act, s 29(10)

<sup>2</sup> *ibid*, s 35

- New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union (USU).
14. The parties argued the reduced caps and restrictions on ‘acting in concert’ impermissibly burdened the implied freedom of political communication within the Australian Constitution.
  15. On 29 January 2019 the High Court handed down its decision in favour of the Unions. The NSW Government was also ordered to pay the costs for the unions<sup>3</sup>. The unanimous decision:
    - found the caps on third-party campaigns were invalid. The Court found the \$500,000 cap (or \$250,00 for campaigners registered after October 1, 2018) was too low and impermissibly burdened the implied freedom of political communication.
    - did not address the question on the validity of the ‘acting in concert’ provision as it was unnecessary to do so as the provision had no work to do as it fell away with the caps no longer being applicable.
  16. Justice Edelman in his judgement did address the issue of ‘acting in concert’ and argued the provision was unconstitutional<sup>4</sup>.
  17. The practical application of the High Court decision was to remove the global cap on third-party campaigners from the Act while electorate specific spending and electoral expenditure at local government elections remained unchanged.
  18. Subsequent to the High Court’s decision, the NSW Government has not amended the Act. Instead, on 8 February 2019, less than two months before the election and after the last NSW Parliament had been dissolved for its term, the NSW Government introduced the *Electoral Funding Amendment (Savings and Transition) Regulation 2019* (the Regulation). The Regulation re-instated caps for third-party campaigners of \$1,288,500 if they were registered before 1 October 2018 or \$644,300 if they registered after that date. The cap level was taken from the repealed *Election Funding, Expenditure and Disclosures Act 1981* and was applied retrospectively. The Regulation expires on 31 December 2019.

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<sup>3</sup> Unions NSW v New South Wales [2019] HCA 1

<sup>4</sup> Edelman in Unions NSW v New South Wales [2019] HCA, at [160]

19. Unions NSW believes it is likely the NSW Government will re-introduce expenditure caps for the third time again targeting third-party campaigners prior to the 2023 State Election.
20. Relying on the High Court's decisions Unions NSW believes any future expenditure caps should be set at a level which does not impermissibly burden the implied freedom of political communication genuinely allowing third-party campaigners to interact with electors and communicate their campaign message during NSW elections. Unions NSW opposes a reduction in the expenditure cap for third party campaigners.

### **Impact of expenditure caps on third party campaigners**

21. The High Court handed down its decision 53 days before the 2019 State Election. Prior to the decision, third-party campaigners were restricted to a spending cap of \$500,000 for the expenditure period of 1 October to the date of the State election in the following March and were further limited in how third-party campaigners could co-ordinate their activities with other third-party campaigners.
22. After the decision, many third-party campaigners were unable to take full advantage of the increased expenditure caps, given the limited time left until the election, and were significantly disadvantaged.
23. The pending High Court decision created significant uncertainty among third-party campaigners regarding their spending within legislative requirements in the leadup to the election. This resulted in unions significantly curtailing the scale of third-party campaigns during the 2019 state election.
24. Unions NSW notes at the time Submissions were due, the NSW Electoral Commission had not yet published the expenditure returns of third-party campaigners for the 2019 Election. However, as a result of the restrictive caps placed on third party campaigners, and the uncertainty of the High Court case, expenditure of third-party campaigners is likely to be lower than it would have been if the cap was set at \$1,288,500 for the full 6 months prior to the election. This means the levels of expenditure for third-party campaigners for the 2019 election, should not be considered an accurate representation of what it costs to run a third-party or would be expended in an electoral campaign with appropriate funding caps.

## Acting in concert provisions

25. The *Electoral Funding Act* maintains a restriction on third-parties from ‘acting in concert’. The expenditure caps imposed under the 2019 Regulation are not covered by the ‘acting in concert’ provision. This is because they are not considered an ‘applicable cap’ within the meaning of s 35 of the Act. In practice, the ‘acting in concert’ provision is limited by the absence of third-party expenditure caps in the legislation. Other restrictions on expenditure and ‘acting in concert’ remain, including a restriction on third-party campaigners ‘acting in concert’ in relation to electoral district specific expenditure.
26. Unions NSW is opposed to the ‘acting in concert’ provisions in the Act as they impermissibly burdened the implied freedom of political communication. The provisions are an attack on the ability of unions and other third-party campaigners to collaborate and coordinate on key issues shared between groups.
27. If caps on third-party campaigners are re-introduced into the legislation, the ‘acting in concert’ provisions will apply. The provisions make it unlawful for third-party campaigners to ‘act in concert’ with other persons to incur electoral expenditure that exceeds the applicable cap.
28. The definition of ‘act in concert’ is broad and refers to a formal or informal agreement to campaign with the principal object of having a party or candidate elected or opposing their election. This section of the Act is new and untested. It remains unclear what campaign activities would be captured by the provision or how it would be enforced.
29. As previously noted, the High Court did not make a ruling on the ‘acting in concert’ provision because it was considered unnecessary as a result of the third-party expenditure caps being found to be void. The constitutional validity of the ‘acting in concert’ provision remains uncertain.
30. In his judgement, Justice Edelman was the only judge who considered the validity of the ‘acting in concert’ provision. In his judgement, his Honour found the ‘acting in concert’ provision was constitutionally invalid and was ‘... incompatible with the maintenance of the constitutionally



prescribed system of representative and responsible government<sup>5</sup>.

31. If the NSW Parliament were to amend the Act to re-activate the ‘acting in concert’ provision, third-party campaigners would strongly consider challenging the constitutional validity of the state’s electoral laws for a third time.

## Reporting requirements

32. During the 2019 State Election, Unions NSW was registered with the NSW Electoral Commission as a third-party campaigner. Unions NSW complied with all requirements of the *Electoral Funding Act 2018*, the *NSW Electoral Act 1912* and the *Electoral Funding Amendment (Savings and Transition) Regulation 2019*. Unions NSW submitted an Annual Disclosure of Electoral Expenditure to the NSW Electoral Commission on 22 September 2019.
33. Reporting requirements of the Act required significant administrative investment by Unions NSW. The return involved 14 days of work, with input from several staff members. While Unions NSW has the resources to comply, this is an onerous burden which is placed on smaller organisations, particularly volunteer driven organisations, in being able to comply with the reporting requirements of the legislation. Unions NSW opposes the introduction of any further reporting requirements on third-party campaigners as they have the potential to be an unfair burden on community-based organisations.

### Reporting of social media content

34. The Unions NSW disclosure included hundreds of transactions with invoices, receipts and copies of electoral material having to be provided to the Electoral Commission. This proved particularly onerous for social media content spending on Twitter and Facebook. Unions NSW believes the reporting requirements for small electoral expenses, particularly around social media content, should be relaxed. The monetary investment on social media is minimal compared to other forms of electoral communications. The nature of how social media content is costed, also increases the administrative burden of recording expenditure.

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<sup>5</sup> Edelman in *Unions NSW v New South Wales* [2019] HCA, at [160]

35. Unions NSW reported on all social media spending and as required by the Act provided copies of all paid social media content. Unions NSW:
- Sponsored 11 pieces of social media content on Facebook and Twitter. Content included images and short videos.
  - Spent an average of \$33.79 per advertisement. Advertisement spends ranged from \$10.25 - \$950.00.
  - Recorded 37 line items for the 11 advertisements in the Electoral Commission return. While there were only 11 pieces of content, each time a piece of content was 'boosted' a new expenditure line was required.
36. Compared to more traditional forms of electoral advertising, social media content requires significantly less investment, in terms of both creation and the cost of distribution. Prior to social media advertising, it was not possible to generate and promote an advertisement to a targeted audience for under \$15. It is overly onerous for copies of all social media content, particularly those with minimal expenditure, to be included with the electoral return. Unions NSW appreciates the value of the NSW Electoral Commission collating electoral material produced by campaigners, but believes a minimum spend threshold should be introduced around this reporting requirement. Currently the reporting requirements treat a \$100,000 television advertising buy the same as a \$20 promoted Facebook post. The investment and reach of the two types of advertising are vastly different and thus they should be treated differently in terms of reporting requirements.

Reporting format

37. Unions NSW provided their Electoral Expenditure Disclosure to the Electoral Commission in both hard and soft copies. Unions NSW expenditure items did not fit on the provided form, as such Unions NSW utilised the Commission's approved spreadsheet to provide information.
38. Unions NSW was not able to lodge the disclosure via email. This is because copies of electoral material were too large to be sent via email and needed to be provided to the Electoral Commission via USB. The disclosure process should be streamlined and simplified to make the process more accessible for all campaigners. Unions NSW believes the Electoral Commission should invest in developing the ability for campaigners to upload or lodge disclosures online, including the ability to upload campaign material.

39. In the reporting process there was significant double-up between the Unions NSW general governance and reporting requirements and the Electoral Commission’s reporting requirements. This process could have been simplified if the Commission’s reporting format better aligned with commonly used accounting software programs such as Xero. This alignment may include the ability for the disclosure to incorporate uploads directly from accounting software. Such alignment would assist in improving the accuracy of disclosures and allow for disclosures to be prepared in a timelier manner.

## Conclusion

40. Third party campaigners play a crucial role in the electoral process, providing voters with an avenue to collectively pool their resources and raise issues important to them. Unions NSW opposes any changes to the *Electoral Funding Act* which would restrict the ability for third-party campaigners to participate in electoral campaigns.
41. Further, the NSW Parliament should be mindful of the implied freedom of political communication for political parties and third-party campaigners when considering any changes to the current operation of state elections.