

**Submission
No 3**

**CAPS ON THIRD-PARTY CAMPAIGNERS' ELECTORAL EXPENDITURE IN
S29(11) AND S35 OF THE ELECTORAL FUNDING ACT 2018**

Organisation: Business NSW

Date Received: 22 April 2022

BUSINESS NSW

22 April 2021

Mr Lee Evans MP
Chair
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: electoralmatters@parliament.nsw.gov.au

Dear Mr Evans

CAPS ON THIRD PARTY CAMPAIGNERS' ELECTORAL EXPENDITURE IN s29(11) AND s35 OF THE ELECTORAL FUNDING ACT 2018

Business NSW welcomes the opportunity to provide input to the Joint Standing Committee on Electoral Matters (Committee) inquiry into caps on third party campaigners electoral expenditure under the *Electoral Funding Act 2018* (Act).

As NSW's peak business organization, Business NSW has more than 30,000 member businesses across NSW. We work with businesses spanning all industry sectors including small, medium and large enterprises. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state and federal level.

Business NSW supports robust, transparent and respectful election campaigning activity. We welcome the contest of ideas and accountability election campaigns bring to our democracy, our public administration and the communities our member businesses operate in. Our experience has proven that working together drives prosperity, creates new jobs, and builds better communities for everyone.

Business NSW – as a non - partisan organisation not aligned to a party or candidate - has participated previously in NSW general elections as a third party campaigner, where 'third party campaigner' is defined in section 4 of the Act:

for a State election—a person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a State election during a capped State expenditure period that exceeds \$2,000 in total.

While the Act regulates third party campaigner activity more generally (for eg – section 27 'Capped State expenditure period', section 29 'Applicable caps on electoral expenditure for State election campaigns') Business NSW notes that the Committee's current inquiry is focused on the following:

Section 29 – Applicable caps on electoral expenditure for State election campaigns

(11) for a by-election for the Assembly, the applicable cap for a third party campaigner is \$20,000 for each by-election.

Section 35 - Limit on electoral expenditure—third-party campaigner acting in concert with others

(1) It is unlawful for a third-party campaigner to act in concert with another person or other persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period for the election that exceeds the applicable cap for the third-party campaigner for the election.

(2) In this section, a person acts in concert with another person if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of—

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

Section 29 (11) – Applicable caps on electoral expenditure for State election campaigns (by-elections)

By-elections are generally not commonplace, although Business NSW notes in February 2022 four such by-elections were held in NSW. In by-elections, as in general elections, it is important to note the competing principles at play when it comes to seeking to advocate and influence.

The constitutional implied freedom of political communication – as affirmed and defined by the High Court of Australia since it was first recognised in 1992 in *Nationwide News Pty Ltd vs Wills* (1992) HCA 46 – is an important principle in consideration of electoral expenditure laws. This principle is tempered with the equally important ‘level playing field’ when it comes to political engagement, in that the loudest (and most wealthy) actors in the political field should not be unfairly advantaged compared to others who might seek to influence and advocate.

This balance is reflected in section 29(11) of the Act. Business NSW is of the view the requirements in section 29(11) of the Act – that a third party campaigner in a by-election can spend up to \$20,000 on electoral expenditure - is reasonable and adequate.

Section 35 - Limit on electoral expenditure—third-party campaigner acting in concert with others

Section 35 also revolves around the equality of the electoral playing field. Business NSW notes this section was considered (but not decided) by the High Court in *Unions NSW v New South Wales* (2019) 363 ALR 1, where a number of Unions registered as third party campaigners challenged the validity of, among others, section 35 of the Act as it would prevent third party campaigners from mounting as effective a campaign as possible.

As mentioned, Business NSW represents the needs of business at a local, state and federal level as the peak business body in NSW. It is not the practice of Business NSW to 'act in concert with others' when it comes to electoral expenditure, although Business NSW will partner with other organisations that seek better outcomes for our members.

As such, Business NSW is of the view that section 35 of the Act continues to achieve the right balance and should be retained.

If you would like to discuss this submission in more detail, please contact [REDACTED], General Manager, Government Relations, either by email [REDACTED] or by telephone on [REDACTED].

Yours Sincerely,

A large black rectangular redaction box covering the signature area.

David Harding
Executive Director, Policy & Advocacy