

**Submission  
No 5**

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

**Organisation:** NSW Electoral Commission

**Date Received:** 29 April 2022

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

29 April 2022

Dear Mr Evans

**Inquiry into caps on third-party campaigners' electoral expenditure in s 29(11) and s 35 of the *Electoral Funding Act 2018***

Thank you for your invitation to the NSW Electoral Commission [**the Electoral Commission**] to make a submission to the Inquiry of the Joint Standing Committee on Electoral Matters into caps on third-party campaigners' electoral expenditure in s 29(11) and s 35 of the *Electoral Funding Act 2018* [**the Inquiry**].

The Inquiry's Terms of Reference are as follows:

1. whether the existing cap on electoral expenditure by third-party campaigners for an Assembly by-election under section 29(11) of the *Electoral Funding Act 2018* is reasonably adequate;
2. if the answer to question 1 above is 'no', what the amount of the applicable cap should be; and
3. whether the prohibition on third-party campaigners acting in concert with others to incur electoral expenditure in excess of the applicable cap on electoral expenditure in section 35 of the *Electoral Funding Act 2018* should be retained, amended or repealed.

**Regulation of electoral expenditure of third-party campaigners**

Under the *Electoral Funding Act 2018* [**the EF Act**], the Electoral Commission has, *inter alia*, the function of administering the election funding, expenditure and disclosure scheme under that Act, and registering electoral participants for the purposes of that scheme. Among those participants are third-party campaigners [**TPCs**], defined in s 4 of the EF Act as follows:

- (a) *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,*

- (b) for a local government election—a person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a local government election during a capped local government expenditure period that exceeds \$2,000 in total,
- (c) a registered third-party campaigner for an election for which it is registered.

The Electoral Commission's submission is limited to the Inquiry's Terms of Reference 1 and 2, and to observations on issues which its administration of the EF Act has revealed, namely:

1. data on TPC electoral expenditure at State by-elections; and
2. inconsistencies in the provisions for TPC electoral expenditure caps.

### Limited data is available on TPC electoral expenditure at State by-elections

The EF Act commenced operation on 1 July 2018. Since that date, State by-elections [SBEs] have been conducted by the Electoral Commissioner under the EF Act for six electoral districts, namely, Wagga Wagga in 2018; Upper Hunter in 2021; and Bega, Monaro, Strathfield and Willoughby on the same date in 2022.

The amount of electoral expenditure incurred for the SBEs for the electoral districts of Bega, Monaro, Strathfield and Willoughby is not yet available, as the due date for disclosure of that electoral expenditure is 22 September 2022.

Of the two earlier SBEs, electoral expenditure is available only for the Upper Hunter SBE held on 22 May 2021, as there were no TPCs registered for the Wagga Wagga SBE held on 8 September 2018. The below data for the Upper Hunter SBE suggests that no TPC exceeded the statutory cap on electoral expenditure in that campaign, and that only one TPC came close to reaching the cap:

Stakeholder: Stakeholder Name	Current Person Responsible Name	Election Event: Election Event Name	Total EE Incurred
Australian Nursing and Midwifery Federation NSW Branch	Brett Howard Holmes	Upper Hunter 2021 State By-Election	-
Australian Rail Tram and Bus Industry Union New South Wales Branch	Aaron John Izzard	Upper Hunter 2021 State By-Election	1,566.19
Automotive Food Metals Engineering Printing Kindred Union	Sanja Batar	Upper Hunter 2021 State By-Election	1,000.00
CFMEU Northern Mining & NSW Energy District	Shane Russell Thompson	Upper Hunter 2021 State By-Election	21,104.00
Health Services Union NSW	Gerard Hayes	Upper Hunter 2021 State By-Election	-
New South Wales Local Government Clerical Administrative Energy Airlines & Utilities Union	Feng Yan Huang	Upper Hunter 2021 State By-Election	-
NSW Minerals Council Ltd	Christina Jean Molinari	Upper Hunter 2021 State By-Election	16,398.83
NSW Nurses and Midwives' Association	Brett Howard Holmes	Upper Hunter 2021 State By-Election	-
Police Association of NSW	Patrick Gooley	Upper Hunter 2021 State By-Election	5,100.00
Public Service Association of NSW	Troy Stephen Wright	Upper Hunter 2021 State By-Election	16,392.03
Shop Assistants & Warehouse Employees Federation of Australia Newcastle & Northern New South Wales	Barbara Nebart	Upper Hunter 2021 State By-Election	526.35
Unions NSW	Sharon Gauten Ooi	Upper Hunter 2021 State By-Election	18,648.07
			<b>80,735.47</b>

### Inconsistencies in the current provisions for TPC electoral expenditure caps

In the course of regulating TPC electoral expenditure, the Electoral Commission has identified two potential drafting issues.

The first issue may be explained with reference to the High Court decision in *Unions NSW v New South Wales* [2019] HCA 1 [*Unions NSW*]; the second issue may be an error in replicating in the EF Act, the earlier relevant provisions of the now-repealed *Electoral Funding Expenditure & Disclosures Act 1981* [the **EFED Act**].

### **Issue 1 - the EF Act provides for TPC expenditure caps for State by-elections, but not for State general elections**

The first issue is that, while there is a cap on TPC electoral expenditure for a SBE, there is no equivalent valid cap on TPC electoral expenditure for a State General Election [SGE].

In *Unions NSW v New South Wales* [2019] HCA 1, the High Court held that the expenditure caps purported to be imposed by s 29(10) of the EF Act in relation to TPCs for a SGE were invalid. In response, a note was added to the EF Act in relation to s 29(10), which provides as follows:

On 29 January 2019, the High Court of Australia in *Unions NSW v New South Wales* [2019] HCA 1 declared that the cap imposed by section 29(10) is invalid.

However, as the High Court was not asked to rule on s 29(11) of the EF Act in relation to SBEs, the TPC expenditure cap for a SBE in the EF Act has not been held to be invalid, resulting in an anomaly between the TPC caps applicable for by-elections and for general elections.

### **Issue 2 - the EF Act provides different caps per electoral district dependent on whether one or more SBEs are being held on an election day**

The second issue is that the TPC additional electoral expenditure cap for individual electoral districts, applicable where there is more than one SBE being held on the same day, is higher than the TPC electoral expenditure cap for a single SBE. Where a single SBE is held, the cap on TPC electoral expenditure is **\$21,600**. Where multiple SBEs are held on the same day, the cap on TPC electoral expenditure is the higher amount of **\$26,700** for each electoral district within the TPC's overall cap.

Section 29(11) of the EF Act provides for the applicable caps on electoral expenditure for – effectively - a SBE for one electoral district:

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

Section 29(12)(b) of the EF Act provides for the cap on TPC electoral expenditure for multiple SBEs held on the same day:

*(12) **Additional cap for individual Assembly seats** The applicable cap for parties and third-party campaigners is subject to an additional cap (within the overall applicable cap) in relation to State general elections, or by-elections in more than one electoral district, for electoral expenditure incurred substantially for the purposes of the election in a particular electoral district, being—*

*(a) in the case of a party—\$61,500 in respect of each such electoral district, or*

*(b) in the case of a third-party campaigner—\$24,700 in respect of each such electoral district.*

The cap amounts in the EF Act at s 29(11) and s 29(12)(b) have since been adjusted for inflation following the 2019 SGE and are now **\$21,600** and **\$26,700** respectively.

The electoral district cap on TPC electoral expenditure for multiple SBEs held on the one election day imposes criteria around the expenditure subject to that cap that do not apply in the event that only one SBE is being held; these criteria relate to the expenditure in the particular electoral district. Section 29(13) of the EF Act provides as follows:

*(13) For the purposes of subsection (12), electoral expenditure is only incurred for the purposes of the election in a particular electoral district if the expenditure is for advertising or other material that—*

*(a) explicitly mentions the name of a candidate in the election in that electoral district or the name of the electoral district, and*

*(b) is communicated to electors in that electoral district, and*

*(c) is not mainly communicated to electors outside that electoral district.*

Nonetheless, this distinction does not appear to explain the different amounts.

The Electoral Commission notes that, at the introduction of the EF Act, the TPC SBE additional cap for individual electoral districts was set by s 29(12)(b) of the EF Act as **\$24,700**; this reflected the amount which had been set by s 95F(12)(b) of the EFED Act, adjusted for inflation following the 2015 SGE.

In contrast, the TPC SBE additional cap for individual electoral districts was written into s 29(11) of the EF Act as **\$20,000**. This amount reflected the dollar value set by s 95F (11) of the EFED Act at the commencement of the provision, and not the value adjusted for inflation following the 2015 SGE (as was the case with s 29(12)(b) of the EF Act). The value adjusted for inflation was **\$24,700** at the time of the commencement of the EF Act, which was the same as for the TPC additional cap for individual electoral districts at that time.

Section 95F (11) and (12) of the EFED Act provided as follows:

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

*(12) **Additional cap for individual Assembly seats** The applicable cap for parties and third-party campaigners is subject to an additional cap (within the overall applicable cap) in relation to State general elections, or by-elections in more than one electorate, for electoral communication expenditure incurred substantially for the purposes of the election in a particular electorate, being:*

*(a) in the case of a party—\$50,000 in respect of each such electorate, or*

*(b) in the case of a third-party campaigner—\$20,000 in respect of each such electorate.*

The Electoral Commission notes that when the amounts were 'carried over' from the EFED Act to the new EF Act, the adjusted amount was correctly inserted into s 29(11), but it appears likely that the unadjusted amount may have been erroneously used in s 29(12)(b). If that is the case, it may be that the intended policy of the scheme was that the value of the cap on TPC electoral expenditure for a SBE under s 29(11) of the EF Act should be **\$26,700**, and not **\$21,600** as it currently provides.

If you have any questions in relation to the submission, please contact the NSW Electoral Commission Secretariat, [REDACTED], at [REDACTED].

Yours sincerely

[REDACTED]

Hon Arthur Emmett AO QC

**Chairperson of the NSW Electoral Commission**