

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

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AUSTRALIAN EDUCATION UNION
NEW SOUTH WALES TEACHERS FEDERATION BRANCH

SUBMISSION TO

Parliament of New South Wales
Joint Standing Committee on Electoral Matters

INQUIRY INTO

Caps on third-party campaigners' electoral expenditure in s29(11) and s35
of the *Electoral Funding Act 2018*

Authorised by



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INTRODUCTION

The matters raised in the terms of reference of the present inquiry are of critical significance to ensuring the fairness of State elections in NSW.

As a democratic union that advocates for equality and democratic participation in society, the Australian Education Union NSW Teachers Federation Branch (the Federation) welcomes the opportunity to present this submission on behalf of its members. The Federation's financial membership currently stands at over 60,000 teachers and student teachers, most of whom work within public schools and TAFE.

In addition to representing its members, the Federation proudly campaigns so that every one of our students enjoys a world-class public education. To this end, we have campaigned in NSW State elections to increase government funding to public schools and TAFE, and to reverse the privatisation of the vocational education sector.

The Federation is not affiliated to any political party.

The Federation is affiliated to Unions NSW, and notes that the matters raised in the terms of reference are of great importance to the broader union movement across NSW. One indicator of this is that a number of unions, including the Federation, previously presented submissions on similar and related matters following the State general election in 2019.¹

Unfortunately, the restrictions on our ability to campaign in State elections, as a result of s29(11) and s35 of the *Electoral Funding Act 2018* (the Act), continue to deny a voice to our members and to school and TAFE communities. We cannot accept a situation where teachers, students and parents are drowned out on matters as significant to the public interest as providing high-quality education (including vocational education) to all.

RECOMMENDATIONS

We present the following recommendations to the Joint Standing Committee on Electoral Matters (the Committee):

- 1. State elections in NSW should be as democratic and fair as possible. Non-candidate voices should have an opportunity to take part in robust political and electoral campaigning, without being drowned out by unreasonable and inadequate electoral expenditure caps. It should be lawful for third-party campaigners with common interests and goals to participate collectively in political debate and campaign jointly during elections, consistent with the implied freedom of political communication within the Australian Constitution.*
- 2. The cap on electoral expenditure by a third-party campaigner for a by-election for the Assembly, of \$21,600 for each by-election, is not reasonably adequate. To ensure that third-party campaigners have a fair and reasonable opportunity to present their case to voters and compete meaningfully during an Assembly by-election, the applicable cap should be no lower than the candidate cap, currently set at \$265,000. The applicable cap must be sufficient to prevent third-party campaigners such as unions and civil society organisations from being drowned out by candidates. Further, any applicable cap must not impermissibly burden the implied freedom of political communication in the Australian Constitution.*

¹ See <https://www.parliament.nsw.gov.au/ladocs/submissions/66191/Submission%2012%20-%20Australian%20Education%20Union%20New%20South%20Wales%20Teachers%20Federation%20Branch.pdf>

3. *Section 35 of the Act should be repealed. It should not be unlawful for unions to campaign jointly with other unions and civil society organisations in pursuit of common interests and goals. It should be lawful for unions to conduct coordinated election campaigns under the leadership of our peak body, Unions NSW.*

WE CAMPAIGN FOR OUR MEMBERS AND OUR STUDENTS

The Federation has never restricted its campaigning to industrial matters such as members' salaries, working conditions and staffing. On the contrary, we have a long history of campaigning to advance the provision of public education, as a critical component of a democratic and fair society.

We made the following two statements in our submission to the Parliament of New South Wales on the administration of the 2019 NSW State election and related matters:

"The Federation advocates for a well-funded, universally accessible, world class public education system staffed by highly qualified teachers being the professional advocate for our members. We are committed to improving the working conditions of teachers and the learning environments of students in NSW public schools and TAFE colleges."

"Our members care deeply about the students they teach and for the communities in which they work. They are valued and respected members of the community."²

We reiterate that the Federation is not affiliated to any political party. Nor have we, in our campaigning on industrial and broader matters, ever limited our activities to elections, to supporting or opposing a particular party or candidate, or to trying to influence voters.

Nevertheless, State elections, including by-elections for the Assembly, do represent important opportunities for the Federation to advance its industrial, community and political campaigns, in the interests of our members and public school and TAFE communities.

This is because NSW legislation and government policy have a direct and deep impact on the quality and accessibility of public education (including vocational education), and our work in the public sector. For example, the 2.5% public sector pay cap, public schools funding arrangements, and the "contestable funding" model for TAFE, which forces TAFE to compete with private providers for government funds, have all been focuses of the Federation's campaigns in recent times.

Fair Funding and Rebuild with TAFE

As we stated in 2019, the focus of our campaigning in the lead up to the 2019 State general election was in securing the following commitments from all political parties:

- *"Ensuring all public schools are fully funded to 100 per cent of the schooling resource standard (SRS) to equip teachers with the necessary resources to meet student needs.*
- *Restoring government funding of TAFE by ensuring at least 70 per cent of vocational education funding from state and federal governments is provided through the public system."³*

² Ibid

³ Ibid

In 2021, the Federation participated in the *Rebuild with TAFE* campaign, led by the Australian Education Union (AEU). Key campaigning occurred in the context of the privatisation and sale of the state-of-the-art Scone TAFE campus,⁴ prior to the Upper Hunter by-election on 22 May 2021.

The goal of the *Rebuild with TAFE* campaign is to ensure a robust TAFE system across NSW. The “contestable funding” model has contributed to the privatisation of the sector, the cutting of TAFE courses, disparities in student access to vocational education, significant job losses, and the downgrading of course quality. As stated on the campaign website:

“We need a strong TAFE sector to:

- Rebuild a strong workforce of VET graduates equipped with the skills of today and tomorrow.*
- Rebuild our pipeline of essential workers to improve our aged care, childcare and nursing sectors which are chronically understaffed.*
- Rebuild the careers of young people who have been hit hardest by the pandemic.*
- Rebuild our lives after redundancy or career change and help us adapt to technological change.*
- Rebuild sustainable communities in regions already devastated by bushfires and floods, and to respond to local labour market needs due to changing demographics.*
- Rebuild a green economy to train workers and inspire the entrepreneurs of the future to tackle the climate crisis.”⁵*

Our campaigns for fair funding for public schools and for rebuilding with TAFE are in the public interest, reflecting ongoing and urgent priorities:

- A new report⁶ by senior economist Adam Rorris demonstrates that public schools in NSW are underfunded, owing to a government funding shortfall of \$1.35 billion, while private schools are overfunded by \$287 million.⁷
- Owing to government support of private vocational education and training providers, there have been over 5,000 job losses in TAFE NSW since 2012,⁸ with another 678 planned losses revealed in 2021.⁹ At the same time, the most socioeconomically and geographically disadvantaged students have been most negatively impacted by the marketisation of the sector.¹⁰

The Federation’s democratic structures and practices

The Federation is a deeply democratic organisation. For example, the Branch Council is made up of teachers who are elected representatives from their workplaces and Associations.

The campaigns discussed above, like all of the Federation’s campaigns, are developed, approved, and implemented by our members through our democratic decision-making structures. These structures

⁴ <https://news.nswtf.org.au/blog/news/2021/01/scone-tafe-sale-victim-governments-own-policies>

⁵ <https://www.rebuildwithtafe.org.au/about>

⁶ https://www.nswtf.org.au/files/rorris-report_3.pdf

⁷ <https://news.nswtf.org.au/blog/media-release/2022/03/new-report-exposes-shocking-135-billion-funding-shortfall-nsw-public-schools>

⁸ Pennington, A., *An Investment in Productivity and Inclusion: The Economics and Social Benefits of the TAFE System*, Centre for Future Work at the Australia Institute, 2020

⁹ <https://www.smh.com.au/national/nsw/tafe-restructure-forces-job-cuts-and-a-spill-of-hundreds-of-positions-20210405-p57gnh.html#:~:text=A%20spokeswoman%20for%20TAFE%20NSW,are%20not%20front%20line%20jobs>

¹⁰ <https://news.nswtf.org.au/blog/news/2019/03/vocational-learning-opportunities-reduced-many-under-funding-model>

ensure that every member can influence campaigning and campaign priorities, and have a voice in deciding upon the use of the union's resources. The Federation is accountable to its members for its expenditure of funds, including for its electoral expenditure.

Put simply, the members of the Federation determine the union's campaigns and priorities, and the elected Officers implement the relevant decisions.

Every student deserves a high-quality education. The people of NSW deserve a strong, well-supported and well-funded public school and TAFE system.

Unfortunately, in imposing barriers to our campaign activities, s29(11) and s35 of the Act make it extremely difficult for the Federation to act in accordance with its democratic structures and traditions, and to pursue the interests of its members, its students, and school and TAFE communities.

SECTION 29(11) AND S35 OF THE ACT – UNDEMOCRATIC AND UNCONSTITUTIONAL

Recommendation

State elections in NSW should be as democratic and fair as possible. Non-candidate voices should have an opportunity to take part in robust political and electoral campaigning, without being drowned out by unreasonable and inadequate electoral expenditure caps. It should be lawful for third-party campaigners with common interests and goals to participate collectively in political debate and campaign jointly during elections, consistent with the implied freedom of political communication within the Australian Constitution.

The Federation is deeply concerned that s29(11) and s35 of the Act are curtailing the political discourse and debate during elections that forms an essential part of democracy in NSW.

The Federation supports the objects in s3 of the Act:

- (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, associated entities, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme.*

However, s29(11) and s35 are contrary to these very objects in unfairly limiting the capacity of third-party campaigners to participate in Assembly by-elections and to work together with other third-party campaigners.

The Federation reminds the Committee of the 2019 High Court case *Unions NSW v New South Wales [2019] HCA 1*. Unions NSW and a number of other unions, including the Federation, challenged the constitutional validity of the then-new and reduced electoral expenditure cap of \$500,000 for third-party campaigners for State general elections, as well as the constitutionality of the "acting in concert with others" prohibition in s35. The decision by the union movement in NSW to mount such a

significant legal challenge in the High Court provides a clear indication of how seriously these matters are taken by the movement.

The unions argued that the reduced cap and the prohibition on “acting in concert with others” in s35 impermissibly burdened the implied freedom of political communication within the Australian Constitution.

The decision itself, delivered on 29 January 2019, in favour of the unions and with the NSW Government ordered to pay costs, was welcomed by the Federation. The High Court’s unanimous decision was summarised by Unions NSW in a submission to NSW Parliament on 14 October 2019. The High Court:

- *“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.”¹¹*

It should be noted that despite the second point above, “Justice Edelman in his judgement did address the issue of ‘acting in concert’ and argued the provision was unconstitutional”.¹² This is discussed further in the relevant section below.

The High Court’s decision had immediate practical effects for the unions. For example, it enabled the Federation to campaign more freely and effectively in the 2019 State general election, in pursuit of fair funding for public schools and reversing cuts to TAFE.

However, the \$21,600 electoral expenditure cap for third-party campaigners for Assembly by-elections remains, and s35 continues to apply to this particular cap. This unfortunately continues to unjustifiably restrict the constitutional right of third-party campaigners such as the Federation to engage in political discourse and campaigning during Assembly by-elections. Further, there is a risk that a new applicable cap for State general elections could be legislated in future, re-activating the provisions in s35 for these elections.

At the same time, we take heart at the High Court’s 2019 decision in *Unions NSW v New South Wales [2019] HCA 1*. We urge the Committee to heed the implications of this decision when inquiring into and reporting upon s29(11) and s35, in particular, to give serious consideration to the unconstitutional nature of these provisions and their deleterious impact on democracy in NSW. In this spirit, the Committee is urged to endorse all of the Federation’s recommendations in this submission. This will support the protection of constitutional rights to political communication, and provide a fair opportunity to third-party campaigners to have a voice in State elections without drowning out the major political parties.

ELECTORAL EXPENDITURE CAPS FOR ASSEMBLY BY-ELECTIONS

Recommendation:

The cap on electoral expenditure by a third-party campaigner for a by-election for the Assembly, of \$21,600 for each by-election, is not reasonably adequate. To ensure that third-party campaigners have a fair and reasonable opportunity to present their case to voters and compete meaningfully

¹¹ <https://www.parliament.nsw.gov.au/ladocs/submissions/66233/Submission%2020%20-%20Unions%20NSW.pdf>, p.5

¹² Ibid

during an Assembly by-election, the applicable cap should be no lower than the candidate cap, currently set at \$265,000. The applicable cap must be sufficient to prevent third-party campaigners such as unions and civil society organisations from being drowned out by candidates. Further, any applicable cap must not impermissibly burden the implied freedom of political communication in the Australian Constitution.

Unions, community organisations and other civil society groups have a central role to play in elections and holding governments and those aspiring to government and/or elected office accountable. This is not only true for State general elections, but also for Assembly by-elections.

Unfortunately, s29(11) makes exercising this important function almost impossible for third-party campaigners. An electoral expenditure cap of \$21,600 is grossly inadequate. For third-party campaigners to have any measurable influence in an Assembly by-election would require far more than \$21,600. Indeed, expenditure on staff costs alone, such as salaries, travel and accommodation, can easily approach the limits of the cap. Added to this are the costs associated with having to engage in detailed accounting for basic campaigning costs such as petrol. We note that such costs were not previously part of the definition of “electoral expenditure”, until the introduction of the Act.

As a result, under the current provisions, third-party campaigners are left with little scope in Assembly by-elections to expend money on advertisements, the production and distribution of election material (including flyers, which are essential for effectively engaging in by-elections), or research. This is particularly problematic in the contemporary climate, where advertising costs associated with TV, radio and digital advertising are very high. Similarly, any expenditure incurred in raising funds becomes counterproductive for third-party campaigners, given the low cap ceiling.

Collectively, the above considerations have the chilling effect of discouraging third-party campaigners from meaningfully participating in electoral campaigning during Assembly by-elections, since doing so would yield little benefit when considering the likelihood of being completely drowned out by candidates (who can expend more than ten times the cap for third-party campaigners).

Worse, even routine union business, such as organisers meeting with members across NSW to discuss core union campaigns and industrial matters, risks being included in the current definition of electoral expenditure if occurring during the capped expenditure period of an Assembly by-election. Indeed, part of the chilling effect is that even informal discussion with union members about broader campaigns might be avoided, due to fear of inadvertently exceeding the cap.

The applicable cap must be raised significantly. We do not accept that a cap of \$21,600 for third-party campaigners is required to prevent candidates (whether or not endorsed by a party) in Assembly by-elections from being drowned out, given that the current applicable cap for candidates is \$265,000.

When taken together with the prohibition on “acting in concert with others” in s35, it is clear that it is third-party campaigners who are being drowned out, not candidates or political parties.

REPEAL S35 OF THE ACT

Recommendation:

Section 35 of the Act should be repealed. It should not be unlawful for unions to campaign jointly with other unions and civil society organisations in pursuit of common interests and goals. It should be lawful for unions to conduct coordinated election campaigns under the leadership of our peak body, Unions NSW.

Although it is not currently applicable to State general elections due to the High Court decision in *Unions NSW v New South Wales [2019] HCA 1*, s35 of the Act continues to apply to by-elections for the Assembly. The Federation is further concerned that an applicable cap for State general elections may be reintroduced, and therefore that the provisions of s35 may be re-activated. These provisions pose a serious threat to democracy in NSW and are unconstitutional, as they impermissibly burden the implied freedom of political communication protected by the Australian Constitution.

Section 35 of the Act is as follows:

(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.

The definition of “acting in concert” is extremely broad, referring to formal or informal agreements with other persons. It is untested, so that it is not at all obvious what campaign activities might be covered by the provisions or how the provisions might be enforced. As such, it can only have a chilling effect on third-party campaigners.

In *Unions NSW v New South Wales [2019] HCA 1*, Justice Edelman found that the provisions were constitutionally invalid and “... incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government”.¹³

Unions play a very unique role in any system of representative and responsible government. Historically, unions have been central to the expansion of democracy and democratic elections. They unite working people into collective organisations which take collective action to influence legislative change and government and party policy, and combine workers’ resources to counter the enormous and disproportionate influence of the media and business interests during elections.

The connection between the role of unions, democracy and State elections is obvious when considering that the NSW Government is the largest employer in NSW, and public sector workers are directly engaged with communities throughout NSW. Further, public education plays an especially important role in fostering a democratic society. The Federation’s history of political campaigning for increased funding for public schools and the rebuilding of a robust TAFE system is testament to the close connection between the Federation, democracy, and the communities we advocate for.

The Federation cannot carry out its essential role in a modern democracy without being able to act in concert with other unions and civil society organisations, including for the purposes of campaigning in State elections. Unfortunately, s35 negatively impacted upon the Federation’s capacity to campaign in the 2019 State general election, as well as the 2021 Upper Hunter by-election.

We would oppose any future legislative action which may make s35 once again apply to State general elections. Further, consistent with the recommendation above, s35 should be wholly repealed so that it does not impede the capacity of third-party campaigners to engage in campaigning during Assembly by-elections.

¹³ Edelman in *Unions NSW v New South Wales [2019] HCA*, at [160]

The 2019 NSW State general election

Prior to the High Court decision in 2019, unions were restricted to a spending cap of \$500,000 for State general elections. This had an enormous and negative impact on unions' ability to campaign in the 2019 State general election. Given the climate of uncertainty whilst awaiting the High Court decision, unions were forced to significantly limit their electoral expenditure to avoid inadvertently falling afoul of the cap, in no small part due to the chilling effects of s35 in discouraging the coordination of campaign activities between individual unions and Unions NSW.

The High Court handed down its decision 53 days before the election. After this decision, the Federation was able to engage in coordinated campaigning with other unions, including Unions NSW. However, as previously stated by Unions NSW:

*"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."*¹⁴

Thus, whilst the Federation would have preferred to engage in more robust campaigning, it was forced to campaign conservatively and separately to other organisations it is aligned with. As a consequence, it expended far below the applicable cap in connection with the election.

This was not the product of a genuine choice on how much to expend on the election, but a glaring reflection of the curtailment of third-party campaigns by the undemocratic provisions of s35. Indeed, we consider that even the applicable cap of \$500,000 was far too low for meaningfully campaigning in a State general election.

The 2021 Upper Hunter by-election

The *Rebuild with TAFE* campaign predated the 2021 Upper Hunter by-election and is much broader in scope. Its focus in the Upper Hunter region in 2021 was squarely on the sell-off of the Scone TAFE campus and the privatisation of TAFE across NSW, and the Federation campaigned in a coordinated fashion with other unions and Unions NSW on these matters. Unfortunately, in light of the by-election, the acting in concert prohibition in s35, when taken together with the paltry cap under s29(11), ultimately had the effect of undermining the broader campaign and forcing aligned unions to operate separately.

The Federation undertook the following burdensome measures as part of the broader campaign against the sale of Scone TAFE, to guard against accidentally exceeding the applicable cap as a result of any possible conflation of the broader campaign and the by-election:

- campaigning separately, by selecting days, times and locations for campaign events independently of other unions;
- independently selecting speakers for campaign events;
- ensuring community forums and roundtable meetings, at which members of the public were invited to attend, were events organised and hosted by the Federation alone;
- cancelling involvement in radio advertisements, and conducting radio interviews separately to other unions;
- going against what was historically a standard practice for unions, in opting to not organise joint union delegations to meet with elected representatives; and

¹⁴ <https://www.parliament.nsw.gov.au/ladocs/submissions/66233/Submission%2020%20-%20Unions%20NSW.pdf>, p.6

- not meeting with other unions such as the Public Service Association, and indeed avoiding even engaging in informal conversation with them about the broader TAFE campaign and related political and industrial issues, despite the fact that they also have members working within TAFE NSW and therefore have common interests and goals aligned with ours.

Any legislative provision that produces such an outcome for a vital public campaign, in precluding unions' ability to effectively campaign around the time of a critical by-election period, when the issues raised by the campaign and the by-election are so clearly connected, is simply unfair and unreasonable, undemocratic, and defies common sense.

WHAT OPTIONS ARE LEFT FOR THE FEDERATION?

In the interests of our members, our students and our democracy, the Federation urges the Committee to adopt all three recommendations in this submission.

The industrial rights of our members, along with their ability to effectively pursue industrial campaigns, have long been hampered by unfair access to the NSW Industrial Relations Commission, including the public sector pay cap.

With the introduction of the Act, it appears that our capacity to campaign politically for well-funded public schools, a strong TAFE system, and for the resources to meet our students' needs, is also being placed at risk.

The Federation asks the Committee to consider the following: if the established industrial and political channels are being progressively closed off to our members, what alternative options will we be forced to consider?