

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

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# Unions NSW Submission

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

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## Part 1: Summary of response

1. Unions NSW welcomes the opportunity to make a submission to the Joint Standing Committee on Electoral Matters ('**JSCEM**') inquiry into caps on 'third-party campaigners' ('**TPCs**') electoral expenditure in s. 29(11) and s. 35 of the *Electoral Funding Act 2018* (NSW) ('**EF Act**').
2. In response to the questions posed by the terms of reference, Unions NSW's answers are:

**Question 1:** Whether the existing cap on electoral expenditure by TPCs for an Assembly by-election under s. 29(11) of the Electoral Funding Act 2018 is reasonably adequate?

**Answer 1:** No, the existing cap on TPC electoral expenditure is not reasonably adequate.

**Question 2:** If the answer to question 1 above is 'no', what the amount of the applicable cap should be?

**Answer 2:** The cap for TPC electoral expenditure in a by-election should be the same as the candidate cap.

**Question 3:** Whether the prohibition on TPCs acting in concert with others to incur electoral expenditure in excess of the applicable cap on electoral expenditure in s. 35 of the EF Act should be retained, amended or repealed.

**Answer 3:** S. 35 of the EF Act should be repealed.

## **Part 2: Unions NSW, joint campaigning and the importance of elections to unions and workers**

### Unions NSW as a peak body

3. Unions NSW is the peak body for trade unions and union members in New South Wales. It has 65 affiliated trade unions and trades and labour councils, who in combination represent around 600,000 union members working across all industries in NSW.
4. Unions NSW and its affiliated trade unions, in accordance with our respective objects, have a long history of public advocacy and joint campaigning on industrial, social, and political issues for the benefit of union members. In keeping with this prominent advocacy role on behalf of unions and union members, Unions NSW has a long history of campaigning in elections at the state and federal level.
5. Set out below are the NSW general elections and by-elections since 2015 at which Unions NSW has campaigned, including the reported expenditure for each campaign.

| <b>Election</b>     | <b><u>Disclosed electoral expenditure</u></b> |
|---------------------|---|
| 2022 Bega           | Not yet available                             |
| 2022 Monaro         | Not yet available                             |
| 2022 Strathfield    | Not yet available                             |
| 2021 Upper Hunter   | \$18,648.07                                   |
| 2019 State Election | \$636,433.73                                  |
| 2017 Murray         | \$7,618.31                                    |
| 2017 Cootamundra    | \$9,676.83                                    |
| 2017 Gosford        | \$13,102.77                                   |
| 2016 Orange         | \$16,358.76                                   |
| 2015 State Election | \$719,802.81                                  |

6. While Unions NSW and its affiliates are legally and operationally distinct entities, like any peak body, Unions NSW is accountable to its affiliates. Representatives of the unions affiliated with Unions NSW are represented on the Executive which is the governing body of Unions NSW.
7. Any campaigning which Unions NSW undertakes is linked to pursuing the interests of one or more of our affiliated trade unions and their members. Unless there are legal restrictions on doing so, affiliates are always consulted or involved in planning, managing and executing the campaigns we undertake.
8. In its role as a peak body, Unions NSW has routinely worked with its affiliated unions on campaigns. That engagement with unions in campaigning can take different forms. Campaigns may be run by Unions NSW on behalf of its affiliates, or may be jointly organised and run by Unions NSW with interested unions, or Unions NSW might coordinate a number of separate campaigns.

9. As an affiliate-based organisation, with an overarching approach, Unions NSW can run more cost-effective and cohesive union campaigns compared to many affiliate unions running a series of separate and overlapping or inconsistent campaigns.

#### Unions NSW and joint campaigning with affiliates in elections

10. Prior to the enactment of s. 35 of the EF Act, Unions NSW routinely engaged in electoral campaigning which involved or was co-ordinated with affiliated unions. In the 2015 state general election, for example, Unions NSW co-ordinated a significant campaign, with different unions campaigning on issues of relevance to their members in a campaign co-ordinated by Unions NSW.
11. Joint or co-ordinated campaigning also occurred in various state by-elections including 2014 Miranda, 2014 Newcastle, 2014 Charlestown, 2016 Orange and 2017 Gosford.
12. Although Unions NSW continues to jointly campaign with its affiliates in every other aspect of our work, including industrial, social and political campaigns, since s. 35 was introduced, Unions NSW has been unable to work with its own affiliates in electoral campaigns.
13. The reasons for this are set out in detail in Part 4 below. In summary, however, the breadth and uncertainty in the operation of s. 35, its prohibition of so much of the business-as-usual joint campaigning of unions during elections, and the harsh penalties for breaching the provision, have had a significant deterrent or chilling effect on any joint electoral campaigning for Unions NSW and its affiliates.

#### Why elections and by-elections are important for Unions NSW and affiliated unions to campaign in

14. Although the details are different from election to election, there are many important reasons why Unions NSW and its affiliated trade unions want to participate in elections and by-elections and why it is in the interests of their members for them to do so.
15. NSW State general elections and by-elections always raise a broad range of issues including issues of interest and concern to unions. The powers of state governments and their policies and programs they introduce and pursue have the capacity to affect many aspects of the daily lives of working people.
16. Unions exist to represent and advance the interests of working people through collective action, and those interests are inextricably linked to the legislative and policy agendas of the government of the day. Government decisions impact on wage increases, access to jobs, education, health care, local government services and broader government services for workers and their families.
17. The NSW Government is also the single largest employer in Australia. Its legislative agenda and workplace policies also directly impact the wages and conditions of government-employed union members.
18. Elections are a critical opportunity for the voices of union members and working people to be heard in the political debate. Unlike large corporations, working people do not often sit on government committees and panels, with the opportunity to engage directly with the government or directly affect policy decisions. The main way in which working people

communicate their concerns is by pooling their economic resources to enable them to participate in the political and electoral process. Union membership is the main way to pool these resources, and to allow the voices of working people to be heard.

19. Governments are also most accountable to their electors in the lead up to elections. During election campaigns and in the lead up to an election, Members of Parliament are more accessible, more concerned about the views of electors, and more willing to put and debate positions on policy issues. Issues which are in contest also receive more media coverage during electoral campaigns.
20. TPCs such as unions, who represent a broad membership base, have a central role to play in their contribution to the political debate during election periods. It is vital that unions are able to take a full and active role in campaigning on key issues affecting their members during an election campaign, unfettered by concerns.



### **Part 3: Answer to Questions 1 and 2 on s. 29(11)**

21. Unions NSW submits that the existing cap of \$21,600 on electoral expenditure by TPCs for a Legislative Assembly by-election under s. 29(11) of the EF Act is inadequate. Unions NSW submits that the cap for TPCs should be the same as the candidate cap.
22. The current TPC by-election cap is inadequate because it is set at a level well below the reasonable and ordinary cost of a by-election campaign which would allow issues of concern to union members and workers to be meaningfully and effectively articulated to voters.
23. The cap has increased only minimally from \$20,000 to \$21,600, in the period from 1 January 2011 until now, failing to even keep pace with increases in the ordinary costs of campaigning over that period.
24. The level of the cap at \$21,600 is all the more restrictive when compared to the level of electoral expenditure permitted by candidates, which is \$265,000.
25. To fully appreciate the inadequacy of the cap in s. 29(11) and how it restricts the ability of Unions NSW and affiliated unions to campaign in elections, it necessary to understand the other provisions regulating the expenditure of candidates and parties, and how they have changed. In **Part 3-1**, we explain how s. 29(11) in combination with s. 35 and other EF Act provisions dealing with the expenditure of candidates and parties has increased the disparity between TPCs and candidates when compared to the previous *Election Funding, Expenditure and Disclosures Act 1981* Act (NSW) ('**EFED Act**').
26. Then, against the backdrop set in Part 3-1, we explain how \$21,600 is simply insufficient to meet the reasonable and ordinary costs of campaigning in **Part 3-2**.

#### ***Part 3-1: Increased disparity between TPCs and candidates***

27. With respect to the cap on electoral expenditure by candidates and parties, the EF Act, when compared with its predecessor the EFED Act, significantly increased the disparity between the spending permitted in by-election campaigns for TPCs and that permitted for candidates. This was achieved through:
  - a. The disproportionately higher increase in the by-election cap for candidates in comparison to that for TPCs between January 2011 (in the EFED Act) and now (in the EF Act);
  - b. The relaxation of aggregation provisions applying to the expenditure caps of candidates in State by-elections in the EF Act; and
  - c. The effective ban on the aggregation of TPC caps through the introduction of the acting in concert prohibition (for TPCs only) in s. 35 of the EF Act.

#### Disparity between TPC and candidate caps

28. Under the EFED Act, the disparity between TPCs and parties for by-elections was already grossly inappropriate, at a ratio of 1:10. Under the EF Act, this disparity has increased from a ratio of 1:10 to a ratio of more than 1:12.
29. The amount of the applicable cap for candidates rose from \$200,000 to \$245,000 with the transition from the EFED Act to the EF Act. The amount of that increase alone is more than twice the full amount of the cap applying to TPCs.

30. The table below summarises the Legislative Assembly by-election caps for candidates and TPCs since 2011.

| <b>From</b>     | <b>Candidates</b>         | <b>TPCs</b>               |
|-----------------|---------------------------|---------------------------|
| <b>EFED Act</b> | <b>S. 95F(9) EFED Act</b> | <b>S. 9F(11) EFED Act</b> |
| 1 January 2011  | \$200,000                 | \$20,000                  |
| 27 March 2011   | \$222,300                 | \$22,300                  |
| 29 March 2015   | \$245,600                 | \$24,700                  |
| <b>EF Act</b>   | <b>S. 29(9) EF Act</b>    | <b>S. 29(11) EF Act</b>   |
| 1 July 2018     | \$245,600                 | \$20,000                  |
| Current         | \$265,000                 | \$21,600                  |

As the table shows, the cap for candidates has increased by \$65,000 since 2011. In contrast, the cap for TPCs was adjusted upwards to a high of \$24,700 under the EFED Act and reverted to \$20,000 upon the commencement of the EF Act.

Relaxation of aggregation rules for caps for candidates and parties, resulting in the possibility of spending beyond the cap

31. Second, the rules in the EF Act regarding aggregation of spending between candidates and their parties were relaxed in the transition from the EFED Act.
32. This has been achieved by narrowing the scope of the aggregation provisions in the EF Act.
33. Under the previous EFED Act, the by-election expenditure of a candidate endorsed by a party was aggregated with (relevantly) the by-election expenditure of the endorsing party and any “associated party” (s. 95G(5) EFED Act). “Associated party” was defined to include the scenario in which two registered parties endorse the same candidate for a State election or form a recognised coalition and endorse different candidates (s. 4 EFED Act).
34. However, under s. 30(3) of the EF Act, only the expenditure of the candidate and the endorsing party is aggregated. No other provision appears to require the candidate’s expenditure to be aggregated with expenditure of an “associated entity” of the party. S. 30(4), the only aggregation provision referring to “associated entities”, operates on the applicable cap of an elected member or a party and parties have no applicable caps for State by-elections. This sub-section aggregates the expenditure of an elected member with the expenditure of any “associated entity” of the elected member, but “associated entity” is narrowly defined in the EF Act as a corporation or other entity that “operates solely for the benefit of one or more registered parties or elected members” (s. 4 of the EF Act).
35. The relaxation of aggregation rules for state by-election caps for candidates and parties is illustrated by the following scenario:

A candidate is endorsed by the National Party to run in the State by-election. But the Liberal Party does not endorse a candidate for the by-election. Under the aggregation provisions of the EF Act, the

National Party candidate and the National Party can spend a combined total of \$245,600.

A TPC can spend only up to \$21,600.

However the Liberal Party can spend an *unlimited* amount on a campaign promoting the National Party candidate or criticising another candidate. The Liberal Party can run that campaign on its own or jointly with the National Party candidate and National Party.

For example, in the 2021 Upper Hunter by-election, the leading candidates were Dave Layzell (endorsed by the National Party) and Jeff Drayton (endorsed by the Labor Party). The Liberal Party did not run a candidate in the by-election. However, then-NSW Premier Gladys Berejiklian who led a Liberal-National coalition government in NSW campaigned for Dave Layzell. See:

<https://www.smh.com.au/politics/nsw/gladys-berejiklian-has-her-eye-on-history-at-upper-hunter-byelection-20210522-p57u6w.html>

#### Effective new cap on TPCs through s. 35 of EF Act

36. Third, while the aggregation provisions in the EF Act for candidate and party spending have relaxed, s. 35 has simultaneously tightened the limits on TPC spending by effectively imposing a single overall \$21,600 cap on all TPCs and other persons that wish to come together in a joint campaign, breach of which is a criminal offence.
37. S. 35 is an invention of the EF Act. No equivalent provision existed in the predecessor EFED Act.
38. In contrast to the aggregation provisions described above, s. 35(1) of the EF Act provides that it is unlawful for a TPC 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 TPC for the election*'.
39. As Unions NSW and our affiliates argued in *Unions NSW v NSW* (2019) 264 CLR 595 ('**Unions NSW 2019**') and as Edelman J found in that case, the effect of s. 35 is to prohibit two or more TPCs from coordinating their spending and combining their caps in a joint campaign, even in circumstances where their agreement would not cause either TPC to exceed its individual expenditure cap.
40. As we described in Part 2 and further in Part 4-1, the business-as-usual way of campaigning for unions is joint or collective campaigning. This is the case whether the campaign is an industrial, social or electoral campaign, noting that these categories are not mutually exclusive.
41. The new s. 35 prohibits for no clear reason or proper purpose ordinary campaigning approaches which were permitted under the EFED Act.

42. For example, in the 2016 Orange state by-election under the previous EFED Act, Unions NSW and several affiliates including the NSWTF,<sup>1</sup> ETU,<sup>2</sup> PSA<sup>3</sup> and AMWU<sup>4</sup> campaigned jointly and organised a community campaign which cost \$67,300 in aggregate between the unions. The combined caps of those five TPCs would be over \$100,000, with the campaign falling well within that aggregated amount.
43. However the consequence of the intersection of ss. 29(11) and 35 is that joint campaigning between unions of the kind in 2016 Orange state by-election and at that level is no longer allowed. Unions now would instead have a stark choice – between limiting their joint campaign to the cap of \$21,600, or running entirely separate and unconnected campaigns, in forced ignorance of each other's campaign plans, despite the legitimate wish to send a message endorsed by multiple unions.
44. This outcome occurs despite the union campaign, even at \$67,300, having no capacity to 'drown out' a candidates' campaign with permitted expenditure of (now) \$265,000.
45. S. 35 means that a TPC is effectively penalised for wanting to express a joint message with other persons or groups. This is because s. 35 limits the expenditure for conveying a joint message from several organisations, to the level of expenditure permissible for a single organisation conveying an individual message. Joint messages of TPCs are given special adverse treatment that joint messages which political parties with similar interests do not face.
46. In summary, under the EF Act, two TPCs could each spend \$21,600 (and \$21,600 only) on a by-election campaign but they could not spend \$43,200 jointly on the same campaign. A TPC could face fines and/or imprisonment if they spend above \$21,600.
47. In stark contrast, in a state by-election, a political party can now spend a minimum of \$265,000 (aggregated with the endorsed candidate's expenditure) on its own campaign. In addition to the \$265,000 cap, it can also have the benefit of:
- a. If it were in coalition with another party, an *unlimited* amount through the expenditure of the other party; and
  - b. A co-ordinated campaign, costing multiples of the \$245,600 cap with another candidate or political party (e.g. if the Liberal and National parties decided to run two separate candidates), without any restriction on 'acting in concert'.

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<sup>1</sup> NSW Teachers Federation

<sup>2</sup> Electrical Trades Union

<sup>3</sup> Public Service Association

<sup>4</sup> Australian Manufacturing Workers Union

**Part 3-2: \$21,600 cap inadequate to meet costs of campaigning**

48. The cap in s. 29(11) is inadequate to meet the reasonable costs of campaigning in by-elections.
49. The cap needs to be set at a level that is sufficient to enable TPCs, such as unions, to have their messages heard by the electorate during a by-election campaign having regard to all the relevant circumstances, including:
  - a. What parties and candidates can spend in the by-election;
  - b. The nature of the by-election. For example, whether it is held in a regional area, which may involve additional travel costs; and
  - c. The importance of the by-election.
50. The cap needs to be high enough to cover the reasonable cost of running a campaign in circumstances where the location of the campaign adds cost, and where the by-election is particularly significant and will be hard fought, such as a by-election which could result in the loss of government, or a by-election involving significant political issues in the electorate which will impact outcomes.
51. Unions NSW submits that ultimately the cap should be set with such “bet the farm” by-elections in mind. They are the by-elections of the greatest importance to voters, and to campaigners. In these elections, one would expect an extremely competitive election where parties, candidates and TPCs will choose to spend as much as they are permitted and able to, compared to by-elections where the stakes are lower.
52. These situations, where freedom of political discussion and communication are an essential and vital part of the democratic process, demonstrate why TPCs need to be able to campaign up to the level of candidates and parties. If the cap for TPCs were to be set at the candidate cap level, there would be an equal playing field, recognising the important role of TPCs in the electoral process.
53. The remainder of Part 3-2:
  - a. shows that there is no meaningful way for a TPC to compete against candidates with a \$21,600 cap vs a \$246,000 cap; and
  - b. sets out what a proforma budget with minimum estimated costs for a union TPC to effectively campaign in a by-election .
54. As we have demonstrated in Part 3-1, TPCs are more disadvantaged under the current EF Act than under the previous EFED Act. Our analysis of the \$21,600 cap in s. 29(11) must be viewed with that context in mind.

Campaigning costs: actual expenditure of Unions NSW vs leading candidates in 2021 Upper Hunter

55. To illustrate the point that a TPC cannot compete against candidates with the much higher expenditure cap, we provide a comparison table of the actual expenditure in the 2021 Upper Hunter by-election (**‘2021 Upper Hunter Comparison Table’**). This table compares the expenditure of Unions NSW, Dave Layzell of the National Party, and Jeff Drayton of the Labor Party.



| Cost category <sup>5</sup>  | Unions NSW      | Dave Layzell<br>National Party | Jeff Drayton<br>Labor Party |
|---|-----------------|--------------------------------|-----------------------------|
| TV advertising and production   | \$0             | \$85,559                       | \$7,516                     |
| Radio advertising and production  | \$0             | \$27,588                       |                             |
| Digital advertising   | \$8,498         | \$13,059                       | \$62,860                    |
| Print advertising   | \$0             | \$3,031                        | \$0                         |
| Signage   | \$0             | \$20,557                       | \$13,519                    |
| Corflutes   | \$1,100         | \$13,059                       |                             |
| <b>Subtotal for TV, radio, digital, print and outdoor (signage and corflutes) advertising</b> | <b>\$9,598</b>  | <b>\$188,910</b>               | <b>\$83,895</b>             |
| External graphic design   | \$0             | \$6,655                        | \$0                         |
| Flyers, how-to-votes and other printing   | \$0             | \$40,348                       | \$40,465                    |
| Internet, telecommunications, stationery and postage.   | \$2,095         | \$2,002                        | \$934                       |
| Staff costs (aggregating salary, office accommodation, travel)                                | \$6,955         | \$29,878                       | \$39,043                    |
| Research  | \$2,095         | \$6,600                        | \$28,946                    |
| Fundraising and auditing  | \$0             | \$0                            | \$2,952                     |
| <b>Total expenditure</b>  | <b>\$18,648</b> | <b>\$252,705</b>               | <b>\$201,536</b>            |

56. The table demonstrates a number of pertinent points about campaigning costs.
57. First, election advertising is costly, particularly for the main modern forms of advertising. The expenditure of the leading candidates Dave Layzell and Jeff Drayton on TV, radio, digital and outdoor advertising demonstrates the level of cost involved in advertising, even at a by-election level.
58. Our own estimates of potential advertising expenditure in these categories in a by-election show figures in the range spent by the leading candidates.
59. For the range of types of advertising, to be able to be competitive against an opponent, Unions NSW requires a level of parity in its capacity to spend. Otherwise, our message would be drowned out. \$21,600 is simply inadequate to purchase advertising which will be able to deliver an equivalently effective message when the candidates are spending four to nine times that spend on advertising. The candidates can outspend Unions NSW in these categories by almost or more than:
- Double the TPC cap (Dave Layzell/Nationals in radio advertising and outdoor advertising);
  - Triple the TPC cap (Jeff Drayton/Labor in digital advertising); or
  - Quadruple the TPC cap (Dave Layzell/Nationals in TV advertising).
60. Second, campaigning within any set budget requires strategic choices to be made. Within a \$265,000 cap, candidates and parties have the flexibility to spend large amounts of money on specific types of advertising or on other aspects of the campaign

<sup>5</sup> The figures in this table are taken from the NSW Electoral Commission publicly available disclosures. However, the cost categories have been reallocated where appropriate.

such as research or phone banking. For example, Nationals candidate Dave Layzell focused spending on TV and radio advertising while Labor candidate Jeff Drayton chose to focus spend on digital advertising.

61. The strategic choices available to Unions NSW within a \$21,600 cap are disproportionately limiting and constrain our freedom of political communication. Despite spending close to the expenditure cap, after accounting for unavoidable costs such as staff costs (see below), Unions NSW simply could not afford certain categories of advertising, such as TV advertising (given that there is minimum threshold for such expenditure) or to run a robust digital advertising campaign within that cap.
62. In fact, Unions NSW had to calibrate expenditure below the by-election cap of \$21,600. The choice was made not to undertake on-the-ground campaigning, which would include letterboxing flyers, as it was not possible to meet the costs of printing the same number of flyers as the candidates within the TPC cap.
63. Instead, within the TPC cap, Unions NSW was able to undertake only a very scaled down and minimal advertising campaign – including some social media advertising, some limited phone banking with volunteers, some text message voting reminders, and affixed corflutes at polling booths for polling day.
64. Third, the Upper Hunter by-election also illustrates the impact staff costs can have when the cap is set as low as \$21,600. Staff costs are an unavoidable cost of campaigning. To spend any meaningful time working on a campaign requires a significant investment of labour. In the 2021 Upper Hunter campaign, Unions NSW expended almost a third of the \$21,600 cap on staff-related costs alone. The salary component of this staff-related costs and was approximately \$4,342 and this accounted for only 57 hours of work.
65. Even this level of staffing for a campaign, which consumes such a significant proportion of the total permitted expenditure, is not sufficient staff time to organise a three-to-four-week campaign.
66. Fourth, another unavoidable component of modern campaigning is engaging in opinion research. This usually takes the form of either or both quantitative survey research or qualitative focus group research, undertaken by external research providers.
67. Quantitative survey research costs on average between \$10,000-\$30,000 per poll, per electorate, while a single qualitative focus group costs on average between \$3,000-\$5,000. For research from focus groups to meaningfully inform campaign strategy, multiple focus groups are required. As can be seen from the 2021 Upper Hunter Expenditure Comparison Table, the Labor Party spent \$28,946 in research.
68. The TPC expenditure cap denies TPCs the capacity to undertake equivalent research. In contrast, Unions NSW could only afford to spend a low amount in research, \$2,095, to remain within its expenditure cap. The cap is insufficient to allow TPCs to gain the necessary insights required to compete with the major parties in a by-election.
69. Fifth, it is impossible to campaign jointly with any of our affiliate unions in a meaningful way with an expenditure cap of \$21,600. For example, in the 2016 Orange by-election a joint union campaign spent \$67,300 in aggregate in what Unions NSW considers a meaningful and effective campaign which resulted in the loss of the seat of Orange for the Nationals party.

Example of a pro forma budget for by-elections

70. Although every by-election campaign is different, Unions NSW has endeavoured to demonstrate the kinds of costs which will be involved in any effective by-election campaign, using a pro forma campaign budget, to show that the cap of \$21,600 bears no relation to the actual costs of running a modern by-election campaign.
71. Certain key principles apply to any campaign.
72. In a by-election campaign a political participant, including a TPC, needs to reach everyone in the electorate to meaningfully air its political message. Candidates and parties have the capacity to do that within their expenditure. Meaningful competition between a TPC and parties and candidates should mean that that same reach, unrestrained by a tighter level of spending constraint, is available to TPCs.
73. As we have shown above, any organisation which campaigns will need to be able to spend money on broadcast media, digital and outdoor advertising, and campaign activities that will reach people – billboards, community events, doorknocking, street stalls, rallies etc.
74. Campaign costs will also be dependent on the geographical location of the electorate. Regional electorates require significant additional spending for travel. TV advertising may not be appropriate unless there was an efficient market targeting available (as compared to a general election).
75. Campaigning is a matter of strategic choices and managing constraints within the funding available. Campaigning is also dynamic and needs to respond to the characteristics of a particular electorate or the political developments of the day.
76. Taking these principles into account, this pro forma budget sets out estimates of costs for those items which would normally be included in a reasonable campaign budget.
77. A pro forma budget with the minimum estimated costs for a TPC to be able to effectively campaign in a regional by-election and meaningfully air issues to voters is estimated below (**'Pro Forma Budget'**):

| Cost category                    | Components  | Unions NSW minimum estimate |
|----------------------------------|---|-----------------------------|
| TV advertising                   | N/A   | \$0                         |
| Radio advertising and production | 2 weeks of 8 radio ads per day on radio stations  | \$4,000                     |
| Digital advertising              | 2 weeks of digital advertising in the lead up to election day consisting of: <ul style="list-style-type: none"><li>- Facebook and Instagram: \$10,000</li><li>- Catch-up TV: \$7,000</li><li>- YouTube: \$5,000</li></ul> | \$22,000                    |
| Signage                          | 4 weeks of 1x billboard in a high traffic area  | \$3,500                     |

| Cost category   | Components  | Unions NSW minimum estimate |
|---|---|-----------------------------|
| Corflutes   | 800 corflutes split into:<br>- 650 distributed between 45 polling day and pre-poll booths<br>- 150 distributed to union members and supporters within the community       | \$4,500                     |
| Paid distribution of flyers                           | One flyer to every household – approximately 34,000 households  | \$10,000                    |
| Flyers and how-to-votes                               | 50,000 A4 how-to-votes to be handed out at polling booths for every vote: \$3,650<br>15,000 DL size flyers for letterboxing for specific areas in the electorate: \$1,350 | \$5,000                     |
| T-shirts  | 200 T-shirts for volunteers   | \$2,500                     |
| Internet, telecommunications, stationery and postage. | Texts: \$2,000<br>10,000 persuasion calls: \$1,500  | \$3,500                     |
| Staff costs (salary and allowances)                   | Salary for 2 campaigners – 3 weeks full time<br>Additional support staff<br>Travel and meal allowances  | \$30,000                    |
| Staff costs (travel and accommodation)                | Regional accommodation and travel costs for 2 people over 3 weeks   | \$9,000                     |
| Research  | One quantitative survey research  | \$20,000                    |
| <b>Total</b>  |   | <b>\$114,000</b>            |

78. Given the costs of campaigning, and the level of the TPC cap, it should be recognised that the level at which the cap is set is itself an unconstitutional constraint on the freedom of political communication of TPCs.

79. Setting the cap so low and at a level so far below the cost of running an effective campaign also has a chilling effect in that many TPCs will make an assessment as to whether it is worth the expenditure to run a campaign which is so constrained by the cap that it will be unable to reach enough voters, and decide that in those circumstances it is better to run no campaign than an under-funded campaign which is destined to be unsuccessful.

80. Unions NSW also recommends that the provision be amended to exclude staff costs and costs related to staff costs such as travel and accommodation in the calculation of electoral expenditure.

81. The inclusion of staff costs is particularly burdensome in the context of regional by-elections, given the need for staff to undertake and the costs of extensive travel, which can be needed to campaign effectively in a large regional electorate.

82. It is unclear to some extent which costs should be included as staff costs given the provision. A staff cost is not electoral expenditure if it is not incurred for the **dominant purpose** of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election: s. 7(3) EF Act. For prior, existing employed staff, this lack of clarity can mean that it is unclear which staff, and how much of their time, are included.
83. It is also unfair that an organisation that pays higher wages to its staff should be penalised in their capacity to spend on other electoral communications. The only staffing costs which should be included are the engagement of third parties such as contractors specifically for the period and the purpose of the election.



#### **Part 4: Answer to Question 3 on s. 35**

85. Unions NSW submits that s. 35 should be repealed in all of its operations. It is a direct attack on the freedom of political communication of TPCs and more specifically, limits the freedom and ability of unions to collaborate and jointly campaign.
86. Unions NSW submits that s. 35 operates to diminish political debate and political discourse in support of workers' rights in NSW, especially during state elections.
87. In **Part 4-1**, we describe the history of joint campaigning by Unions NSW and the trade union movement in electoral and non-electoral matters.
88. In **Part 4-2**, we show how the structure of s. 35 and other provisions of the EF Act operate to limit the political communication of unions, in particular unions' business-as-usual joint campaigning.

#### ***Part 4-1: Unions NSW joint campaigning***

89. In Part 2, we described Unions NSW's role as a peak body in coordinating elections and outlined the importance of elections to Unions NSW and affiliated unions as opportunities to air issues concerning the rights of workers. We described joint campaigning as our business-as-usual practice.
90. Here, we describe Unions NSW's reasons for joint campaigning with our affiliates and provide some examples of electoral and non-electoral joint campaigns.

#### **Reasons for joint campaigning**

91. Joint campaigning on issues, whether industrial, political or other issues, is business-as-usual work for unions. Joint campaigning is an important aspect of Unions NSW and our affiliates' approach to campaigning.
92. Joint campaigns build a sense of solidarity. When many unions and their members are jointly involved in a single campaign advocating on common issues, this injects energy and vitality into a campaign. Union members participate in campaigns coordinated by Unions NSW through their individual unions. A combined campaign involving several or more trade unions can reach more union members and voters than the individual advocacy of a single union or of Unions NSW campaigning alone.
93. Having many unions involved in a campaign gives a campaign access to a far wider group of activists and allows it to communicate with more people as this helps spread the campaign message effectively and efficiently beyond the membership of any single union. The union movement has worked on the principle of solidarity and collective action to achieve outcomes since its inception.
94. Joint campaigns highlight the commonality of experiences of union members across multiple unions, diverse industries and backgrounds. Joint campaigning helps the messages of each campaign to come to life by telling real-life and compelling stories about how government policies affect the lives of working people and their families from diverse industries and backgrounds. It is often the strength of those personal stories that enable the union movement to shift the political positions of politicians. It is impossible

for Unions NSW to tell these stories without the ability to campaign jointly with our affiliates. Unions NSW as a peak body does not have its own worker members.

95. Joint campaigns are also more cost-effective. As we described in Part 2, unions are unlike corporations. Union resources are pooled resources from working people. We have an interest in maximising the beneficial use of those resources as much as possible. To do so requires communication and coordination between organisers and campaigners from Unions NSW and our affiliates.

#### Examples of non-electoral joint campaigns

96. Some recent examples of joint campaigns with Unions NSW affiliates over the past few years are listed below. It is impossible to list all the ways in which we jointly campaign with our affiliates, as for Unions NSW, joint campaigns are a business-as-usual practice. These examples give a flavour of the different types of joint campaigns coordinated by Unions NSW and show the overlap between industrial issues and electoral or political issues involving the state government.

97. **Keep Our Hospitals Public (2016-2017)** was a joint campaign with NSWNMA,<sup>6</sup> HSU<sup>7</sup> and ASMOF<sup>8</sup> opposing the NSW State government's intention to privatise five public hospitals in five regional areas – Shellharbour, Maitland, Bowral, Wyong and Goulburn. Unions NSW ran this campaign because of the importance of the issues involved in maintaining a public health system, not only for union members working in those hospitals, but also to maintain publicly owned health facilities for the benefit of the local community. Campaign activities included five rallies in each of the regional areas, doorknocking, radio advertisements and community awareness activities. These hospitals were ultimately not privatised.

98. **#Rights4Riders campaign (2018-2020)** was a joint campaign between Unions NSW and TWU.<sup>9</sup> TWU ran and coordinated the campaign, with Unions NSW's providing resources and assistance. The joint campaign's activities included holding rallies, engaging with food delivery riders at a grassroots level, and engaging with political stakeholders. Many of Unions NSW's other affiliates attended these #Rights4Riders rallies in solidarity with the TWU.

99. **Keep Our Buses Public (2019-2020)** was a joint campaign with RTBU,<sup>10</sup> ASU,<sup>11</sup> AMWU and ETU against the privatisation of Sydney's public bus services operating across the Northern Beaches, Ryde, the Eastern Suburbs, North Sydney and Parramatta. Joint campaign activities included a petition which collected over 25,000 signatures, letters to MPs and local newspapers and nine micro-rallies outside NSW Liberal Government MPs' offices.

100. **No Public Sector Pay Cut (2020)** was a joint campaign with PSA,<sup>12</sup> NSWNMA, HSU and other public sector unions against the pay freeze proposed by the NSW Liberal

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<sup>6</sup> NSW Nurses and Midwives' Association

<sup>7</sup> Health Services Union

<sup>8</sup> Australian Salaried Medical Officers' Federation

<sup>9</sup> Transport Workers' Union

<sup>10</sup> Rail, Tram and Bus Union

<sup>11</sup> Australian Services Union

<sup>12</sup> Public Service Association

government. Joint campaign activities included rallies outside Parliament and a crowdfunded mobile billboard.

101. **No Communities Left Behind (2021)** was a joint campaign with a wide range of affiliates campaigning for greater financial support for areas of Sydney under strict COVID lockdown in Q3 2021. Joint campaign activities included online town halls, surveys and the release of a report.
102. **COVID workers compensation campaign (2020-2021)** with PSA, SDA,<sup>13</sup> ASU, USU, UWU<sup>14</sup> and other affiliates. This campaign successfully the NSW Liberal government to provide workers in certain industries easier access to workers compensation by enacting a presumption in workers compensation legislation that the COVID was contracted by the worker in the course of the worker's employment. This campaign also later prevent the repeal of the same laws. Joint campaign activities included rallies at Parliament where various affiliates spoke, lobbying of crossbench MPs by affiliates and emails to MPs.

#### Examples of electoral joint campaigns

103. In the 2015 state election Unions NSW spent approximately \$719,802 in '*electoral communication expenditure*'. The 2015 state election was a highly coordinated combined union campaign which many of our affiliate unions actively participated in and financially contributed to.
104. In the 2016 Orange state by-election, Unions NSW spent approximately \$16,358 in '*electoral communication expenditure*'. As s. 35 of the EF Act did not exist at the time and Unions NSW and several unions coordinated a joint campaign. In total, all unions spent a total of \$67,373 in the 2016 Orange by-election campaign.
105. We also campaigned in the 2019 election and spent approximately \$636,433 in '*electoral expenditure*'. This campaign was not initially a joint campaign. However, the High Court's invalidation of the state general election cap for TPCs in s. 29(10) of the EF Act, in *Unions NSW 2019*, enabled Unions NSW to jointly campaign with our affiliates from the end of January 2019 for the remainder of the capped expenditure period.
106. In federal elections, we continue to run joint campaigns with our affiliates, given that there is no similar 'acting in concert' prohibition. Notably, the Your Rights at Work campaign (2005-2007) was an industrial campaign against the federal WorkChoices legislation that morphed into a successful federal election campaign to vote out the federal Coalition government.
107. These examples of electoral and non-electoral joint campaigning illustrate the degree to which the acting in concert provisions have the potential to impact trade unions, who routinely work and campaign jointly with Unions NSW. It would be and is anomalous that Unions NSW can work with its affiliates on a major joint campaign on targeted political issues outside an electoral period, such as a campaign about wage increases, or rail safety, or class sizes, but if a by-election is suddenly called, that joint campaign may have to stop in case it is caught by the s. 35 provisions. Such a limitation on the freedom of political communication cannot have been intended and cannot be permissible.

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<sup>13</sup> Shop, Distributive and Allied Employees Association

<sup>14</sup> United Workers Union

**Part 4-2: S. 35 and other provisions of EF Act increase disparity of third-party campaigners relative to candidates and parties**

108. Against the background of joint campaigning, we explain how s. 35 interacts with s. 29(11) and other provisions of the EF Act to severely restrict TPCs as compared to their position EFED Act by describing the three features below:
- a. The breadth and uncertainty of s. 35;
  - b. The uncertainty about which elections it will apply to;
  - c. The disparity between s. 35, the aggregation provisions and the other offences.

Breadth and uncertainty of s. 35 creates a deterrent or chilling effect affecting business-as-usual union work

109. S. 35 is a broadly worded prohibition that has numerous uncertainties in its scope and proper application.
110. S. 35(1) of the EF Act provides that it is unlawful for a TPC 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 [TPC] for the election*”.
111. S. 35(2) provides that a person “acts in concert” with another person if those persons act under an agreement, whether formal or informal, 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.
112. As Unions NSW and our affiliates argued in *Unions NSW 2019*, the only sensible construction of s. 35 is that it prohibits multiple TPCs from incurring electoral expenditure in a joint electoral campaign to support or oppose a party / candidate's election, to the extent that the joint campaign's total expenditure would exceed *one* TPC's cap for a relevant State general election, State by-election or local government election.
113. Further, as Edelman J found in that case although s. 35(1) may not prohibit all agreements to incur electoral expenditure that exceeds the TPC's cap, “*it is likely that there would be few clear cases where a TPC could be confident that its electoral expenditure was not caught by the provision*” (at [185]).
114. This lack of clarity about what ‘acting in concert’ means in practice has created a substantial deterrent or chilling effect that affects the very business-as-usual aspects of union work. As Edelman J accurately pointed out, if there is even a low level of engagement or co-ordination, or information sharing, between two TPCs, those TPCs could not be confident that they were not breaching s. 35. The chilling effect of this position is clear.
115. As we explained in Parts 2 and 4-1 the modus operandi of the union movement is collectivism and campaigning together for workers rights. The union movement has done this for all campaigns, electoral and non-electoral, for various reasons and in various ways since its inception, when it is legally permitted to do so. It is appropriate, legitimate and logical for unions to be able to jointly campaign (and be able to meaningfully present its case to voters), as it has always done.

116. The wording of s. 35 remains problematic in its lack of clarity. There is no certainty for any TPC as to what they can and cannot do before finding themselves suddenly subject to the expenditure cap of another entity entirely, with the added problem that they cannot see or track the expenditure being made by the other party. It is simply unclear what it means in the context of a campaign for a person to 'act under an agreement, whether formal or informal, to campaign' or what level of conduct it catches. Is sharing research acting under an agreement to campaign? Is dividing areas of an electorate to cover, or jointly planning a campaign event, an agreement to campaign? Can unions provide campaign volunteer lists to each other? Does agreement on an election theme constitute an agreement to campaign? These examples illustrate both the lack of clarity in the definition and the consequent uncertainty for TPCs about what they can and cannot lawfully do and demonstrate the burden and level of restraint placed on TPCs by this provision.
117. As soon as some kind of 'formal or informal' agreement to campaign in support of or against a party or candidate is identifiable, the prohibition in s. 35 might apply to any conduct by a TPC broadly consistent with that agreement. In an election campaign, joint activities may be as small as designating people from different unions to do door knocking and as large as running a campaign together with an established campaign committee.
118. Because of the consequences of contravening s. 35, where a union TPC risks up to 2 years' imprisonment and/or a \$44,000 fine, the prohibition has not only discouraged many unions from campaigning together in electoral campaigns, but made unions cautious about any interaction at all in respect of an electoral campaign. S. 35 deterred unions from joint campaigning in the 2019 NSW general election (before the decision in *Unions NSW 2019*), 2021 Upper Hunter by-election and 2022 February by-elections in Bega, Monaro, Strathfield, Willoughby.
119. TPCs also face very practical problems if they do want to campaign in concert with others and accept the restraint that a single cap will apply to the group. In such a case, each TPC managing and monitoring their own spending would also need up-to-date visibility of the spending of all other TPCs, to be able to ensure that the combined spending does not exceed the cap. If one of the TPCs has spent close to the cap, but the others are not aware of that and continue to incur expenditure, all TPCs involved could be inadvertently committing an offence under s. 35. In practice, TPCs create a buffer to ensure that spending does not go over the cap, leading to underspending in many campaigns. In that respect, the cap of \$21,600 is for practical purposes reduced by the buffer to protect against overspending.
120. The possibility of being faced with a criminal offence in those circumstances seems quite inappropriate.
121. The provision can also have a direct effect on the strength and effectiveness of TPC campaigns. Not being able to campaign jointly with others robs campaigns of the depth and engagement they could have had.
122. For example, prior to the writs being issued for the 2021 Upper Hunter by-election Unions NSW was jointly campaigning with NSWTF and PSA with regards to sale of Scone TAFE and TAFE privatisation across NSW. However, after the writs were issued and the capped expenditure period began, Unions NSW could not continue with that



campaign. Because of s. 29(11) and s. 35, Unions NSW then campaigned in the 2021 Upper Hunter by-election on its own, despite there being important industrial and political issues that would have benefited from the input of its affiliate unions NSWTF and PSA.

### The 2023 State General Election

123. At the time of its introduction, the offence in s. 35(1) applied in respect of State general and by-elections and local government elections. Following the High Court's declaration in *Unions NSW 2019* that the TPC cap for state general elections s. 29(10) of the EF Act is invalid, and in light of the fact that there is no current cap on TPC electoral expenditure at a state general election, s. 35(1) can only operate in connection with electoral expenditure for State by-elections and local government elections.
124. In February 2019, the NSW Government passed a remedial regulation, the *Electoral Funding Amendment (Savings and Transitional) Regulation 2019* (NSW) ('**Regulation**'). The Regulation provided that the applicable caps on electoral communication expenditure for TPCs in s. 95F(10) of the EFED Act before its repeal were to apply to the 2019 State general election. The operation of the Regulation ended in December 2019.
125. Unions NSW is concerned the NSW Government will reinstate a TPC expenditure cap for state general elections (as the NSW Government did in 2019) which will reactivate the application of s. 35 to campaigning in a state general election, restricting Unions NSW campaigning options.
126. The threat of the return of s. 35's operation to general election campaigning with a new cap, impacts Unions NSW's planning and expenditure for the March 2023 State election. Given the capped expenditure period commences in October 2022 and campaign preparation will need to commence earlier, the failure of the Government to advise of its intentions with respect to a cap for the 2023 State general election will itself have a chilling effect on whether third parties will gear up for a campaign in an election where they do not know what they can spend, and they do not know if they can work and campaign with other interested organisations.

### The targeting of TPCs, specifically unions, using s. 35 of the EF Act

127. In Part 3-1 we articulated how s. 35 affects the operation of the \$21,600 cap in s. 29(11) and the effect of s. 35 is a complete ban on TPCs campaigning together either in an integrated campaign, or in separate but co-ordinated campaigns, in circumstances where such an agreement would not cause either TPC to exceed its individual expenditure cap. We also described how there has been a relaxation in aggregation rules to the disadvantage of TPCs.
128. In addition to the increased inequity created by s. 35 and the relaxation of the aggregation provisions for parties, we note that s. 35 targets only TPCs, unlike two anti-avoidance offences of general application that existed in the EFED Act and have been maintained in the EF Act:
- a. s. 143(1), which provides that a person who contravenes the electoral expenditure caps with awareness of the facts rendering the act unlawful is guilty of an offence; and
  - b. s. 144(1), which provides that person who enters into or carries out a scheme (alone or with others) for the purposes of circumventing a prohibition or requirement of the electoral expenditure provisions is guilty of an offence

129. Within the context of these other offences in the EF Act it is difficult to see how the targeted nature or special adverse treatment of this provision towards TPCs can be justified.

130. Finally, Unions NSW expresses the concern that s. 35 appears to be directed predominantly at unions, given it is unions who are some of the most regular TPCs who campaign jointly in NSW state elections.

## Conclusion

131. Neither the Schott (Expert Panel) Report of December 2014 or the 2016 JSCEM Report responding to the Schott Report, considered the issue of the TPC by-election cap and the level at which it should be appropriately set, in light of the costs involved in a by-election campaign, or in light of ensuring candidates and parties can deliver their messages effectively.
132. There is no basis for concluding that the restrictions in ss 29(11) and 35 of the EF Act are necessary to prevent TPCs from drowning out of other voices, such as candidates and parties.
133. Rather, as this submission explains s. 29(11) and 35 form a larger context of provisions in the EF Act that work in combination to restrict the ability of TPCs, particularly unions, to meaningfully air their messages during an election campaign. We have shown that \$21,600 is not enough to meaningfully enable TPCs to present a case to voters relative to the parties and candidates' ability to spend.
134. In conclusion, for all of the reasons set out above, our submission is that:
  - a. the current cap in s. 29(11) is inadequate, and should be set at the same level as the cap on expenditure for a candidate; and
  - b. s. 35 should be repealed in its entirety.