

**Submission
No 11**

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

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

9 May 2022

**NSW Labor Submission to the 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**

Dear Mr Evans,

Thank you for the opportunity to contribute to the inquiry into caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the Electoral Funding Act 2018.

NSW Labor notes that the inquiry is subject to a relatively short time frame for such a complex issue. There will be far reaching consequences for any changes made to the electoral laws as a consequence of the inquiry. It is our view that wherever possible changes to the electoral law should be bipartisan. With less than 12 months to go before the State Election, caution should be exercised before making changes to the electoral law.

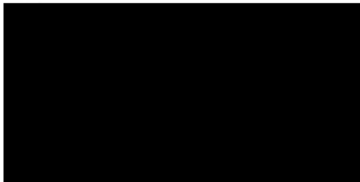
NSW Labor is open to the potential reintroduction of third-party campaign caps on electoral expenditure. However, the provisions introduced into law ahead of the 2019 State Election were unwelcome, largely due to concerns about the additional restrictions placed on third party campaigners including acting in concert provisions.

NSW Labor makes a number of recommendations to improve the conduct of elections in the future.

These recommendations relate to the following:

1. caps on third-party campaigners' electoral expenditure
2. acting in concert provisions relating to third party campaigners

Yours sincerely,



Bob Nanva

GENERAL SECRETARY

1. Caps on third-party campaigners' electoral expenditure

1.1 NSW Labor's approach

NSW Labor supports caps on electoral expenditure including caps on third-party campaigning. We believe that caps are of fundamental importance to democracy in NSW. Labor in Government introduced comprehensive regulation of donations and expenditure as it relates to NSW elections.

Globally, there is increasing concern about the influence of money in the political process with electoral funding a key part of concerns about political integrity. Whilst third-party campaigners must be recognised as valid participants in the electoral process and be allowed to attempt to influence voting, politics in NSW cannot risk becoming an arms race where financial capital is the determining factor in deciding the outcome of elections.

NSW Labor would not oppose the third-party electoral expenditure caps applicable at the 2019 State Election - \$1,288,500 for third-parties registered under the Electoral Act before the capped state expenditure period and \$644,300 in any other case, allowing adjustments for inflation in the future - being applied at the 2023 State Election.

NSW Labor supported the 2020 recommendation of the Joint Standing Committee on Electoral Matters made in the course of their inquiry into the administration of the 2019 NSW State Election:

“That the NSW Government amend the Electoral Funding Act 2018 to provide that the applicable cap for electoral expenditure by third party campaigners for State election campaigns is:

- *\$1,288,500 for those registered under the Act before the capped state expenditure period, and*
- *\$644,300 in any other case, with these amounts to be adjusted for inflation as provided for in Schedule 1 of the Act.”*

NSW Labor strongly agrees with the commonly held rationale for caps, namely that arms races in fundraising and expenditure does not help the electorate. It is important that the undue influence of money in politics be eliminated in NSW. Political campaigns should be focused on campaigning to voters on the issues. A more financially balanced playing field helps to enable a contest of ideas and policies.

Labor introduced spending and donation caps in NSW in 2010 during the Keneally Government. These changes commenced on January 1 2011. Since then it has been unlawful for candidates, political parties, and third-party campaigners to incur electoral expenditure for an election during the capped expenditure period that exceeds the relevant cap. Electoral expenditure captures a range of campaign activities including all forms of advertising, the production and distribution of election material, research and staffing.

Speaking of the measures at the time, then Premier Kristina Keneally said:

“Importantly, these reforms are also directed at reducing the advantages of money in dominating political debate. They provide for a more level playing field for candidates seeking election, as well as for third parties who wish to participate in political debate. These reforms are about putting a limit on the political “arms race”, under which those with the most money have the loudest voice and can simply drown out the voices of all others.”

NSW Labor additionally notes that current electoral expenditure caps for third-party campaigners during by-elections are also very restrictive, and would support reform.

We would welcome the opportunity to consult on any changes to caps considered in the future.

1.2 Key considerations

NSW Labor believes that the state must not impermissibly burden the implied freedom of communication on matters of politics and government. It is necessary for

the parliament to consider whether a third-party campaigner can reasonably present its case within a reduced expenditure limit and in turn ensure that caps do not stifle the voices of trade unions and third-party campaigners. Caps have to be set at appropriate levels.

The reduced electoral expenditure cap on third-party campaigners imposed by the Electoral Funding Act 2018 lowered monetary limit of electoral expenditure to \$500,000 in the six months leading up to a State Election. This was challenged in the High Court. On January 29th 2019 the High Court handed down its decision which included findings that the \$500,000 cap breached the implied freedom of political communication in the Australian Constitution. This finding had implications for the 2019 election in so far as the reduced cap was not enforced and the cap previously allowed under legislation was reinstated for the 2019 State Election only.

The High Court decision also serves as a warning that the Parliament of NSW needs an evidentiary basis for legislation when there are resulting implications for constitutional freedoms.

The Electoral Funding Act 2018 was a product of two inquiries into the issue – the first by an Expert Panel commissioned by then Premier Mike Baird and chaired by Dr Kerry Schott inquiring into political donations, and the second by the Joint Standing Committee on Electoral Matters inquiring into the final report of the Expert Panel and the Government’s response. While the Expert Panel wanted to drastically reduce the cap, it did not provide evidence for whether this was actually needed.

The Joint Standing Committee on Electoral Matters’ final report published in 2016, included a committee comment that:

“The Committee supports the Panel’s recommendation to reduce the cap on expenditure for third-party campaigners. The Committee is of the view that, before implementing this change, the NSW Government should consider whether there is sufficient evidence that a third-party campaigner could reasonably present its case with an expenditure cap of \$500,000.”

Whilst it was the view of the Committee that Government should consider whether there is sufficient evidence for a significantly reduced electoral expenditure cap for third-party campaigners, this was not done. The 2019 High Court decision confirmed the need for evidentiary analysis to justify such a drastic reduction in the cap and noted that the NSW Government had undertaken none.

NSW Labor expresses concern about changes being made to electoral funding legislation without an evidentiary basis and supports in principle any steps that can be taken to ensure evidence is both provided and strongly considered in decision making on electoral funding and expenditure.

Recommendation: *NSW Labor recommends a cap for third-party campaigners set at a level which does not create undue barriers to third-parties presenting their case, whilst also preventing the undue influence of money in state elections.*

Recommendation: *NSW Labor recommends that any changes to electoral expenditure caps be supported by evidence.*

Recommendation: *NSW Labor recommends that the caps for third –party campaigners, adjusted for inflation, applied at the 2019 State Election be applied for the 2023 NSW State Election.*

2. Acting in concert provisions relating to third party campaigners

2.1 NSW Labor’s approach

NSW Labor has specific concerns about provisions contained at section 35 of the Electoral Funding Act 2018 restrict third-party campaigners from acting in concert making it unlawful for two or more campaigners to coordinate campaigns where their combined expenditure exceeds the applicable caps.

The idea that electoral laws would rule out people acting together in political movements appears antithetical to democratic principles. Third-party campaigners are entities with distinct political objectives and distinct sources of funding. Not all third-party campaigners have the social, financial or political capital to affect change on their own. Restrictions on acting in concert inherently disadvantages the implied freedom of political communication for these actors.

Whilst NSW Labor notes concerns about political parties creating front groups in order to bypass caps and exploit the electoral laws that is not what this provision seeks to address. Furthermore, we believe that the aggregation of spending by associated identities with party caps has addressed this. Furthermore, we believe that the circumvention provisions in s144 of the Electoral Funding Act 2018 assist to protect against persons attempting to circumvent electoral expenditure caps.

2.2 Key considerations

Acting in concert provisions contained in s35 of the Electoral Funding Act 2018 prevent third-party campaigners from discussing issues of mutual concern in their campaigns or pooling resources. NSW Labor notes concerns expressed by stakeholders that acting in concert provisions place restrictions on third-party campaigners from advocating together on major issues of joint interest, such as domestic violence, climate change or industrial protections, in case it is captured within an expenditure cap.

Accordingly NSW Labor would support the repeal of these provisions of the electoral law. We view this as both a modest and a conservative proposal which returns the law to the state they were prior to the 2018 amendments and the subsequent court decision to strike key provisions down.

Recommendation: *NSW Labor recommends that acting in concert provisions contained in the electoral law be repealed.*