

**Submission  
No 34**

**ADMINISTRATION OF THE 2023 NSW STATE ELECTION AND OTHER  
MATTERS**

**Organisation:** Unions NSW  
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Partially  
Confidential

# **Inquiry into the administration of the 2023 NSW state election and related matters**

Unions NSW Submission  
March 2024



## About Unions NSW

Unions NSW is the peak body for trade unions and union members in New South Wales. We have 48 affiliated trade unions and trades and labour councils, who collectively represent more than 600,000 union members working across all industries in NSW, including in all areas of the NSW public sector.

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## Abbreviations

We have abbreviated several terms which are repeated in this submission for readability.

Term	Meaning
EF Act 2018	<i>Electoral Funding Act 2018 (NSW)</i>
EL Amdt Act 2022	<i>Electoral Legislation Amendment Act 2022 (NSW)</i>
EF Amdt Act 2023	<i>Electoral Funding Amendment Act 2023 (NSW)</i>
LNP	Liberal-National Party
NSWEC	NSW Electoral Commission
TPC or TPCs	third-party campaigner(s)
<i>Unions NSW No 2</i>	The High Court decision <i>Unions NSW v New South Wales</i> [2019] HCA 1
<i>Unions NSW No 3</i>	The High Court decision <i>Unions NSW v New South Wales</i> [2023] HCA 4

## Part A: Introduction

1. Unions NSW welcomes the opportunity to make a submission to the inquiry into Administration of the 2023 NSW state election and other matters. Our submission is focused on the role of TPCs in election campaigns.
2. Unions NSW and its affiliated unions have a proud history of engaging in electoral politics to represent the interests of union members. In the 2023 state election, Unions NSW and our affiliated unions ran third-party campaigns.
3. Unions NSW was registered as a TPC in the 2023 NSW state election, as we have been in many NSW state elections. Unions exist to represent and advance the interests of working people through collective action, and we intend to continue to participate in future elections as TPCs.
4. It is important for unions to be able to represent the voice of workers in elections. This is because the interests of all workers in NSW are tied to the to the legislative and policy agendas of the government of the day. Moreover, for public sector workers, the NSW Government is the largest employer in NSW whose policies directly impact the wages and conditions of union members.
5. In 2023, our third-party campaign was conducted under the name "Essential Workers Deserve Better". Since at least the COVID-19 pandemic, public sector workers have been extremely dissatisfied with how they were being treated by their employer and elected representatives, the former NSW LNP Government, despite having carried the NSW state through the pandemic.
6. In our campaign, we represented the interests of these workers in the 2023 election and campaigned for:
  - a. A fair pay rise by scrapping the public sector wages cap;
  - b. Fixing the staffing crisis by employing enough staff to deliver the services rely on;
  - c. Ending privatisation by ruling out any more sales of our public assets and services;
  - d. Rebuilding local manufacturing and services by stopping the outsourcing and offering of our services and projects; and
  - e. Same job, same pay by ending the race to the bottom on wages and conditions for workers across the public service.
7. Our campaign mobilised hundreds of workers, especially public sector workers – teachers, paramedics, nurses, cleaners, prison officers and rail workers – who were disillusioned with the former NSW LNP Government. These volunteers participated in various activities including door knocking, phone calls and street stalls.
8. In this submission, we deal with two specific aspects of the 2023 NSW state election.

9. First, in **Part B**, we say that any current or future government of NSW should be mindful about passing electoral laws which infringe the freedom of political communication of TPCs. Laws which seek to silence TPCs are undemocratic.
10. Second, in **Part C**, we draw the Committee's attention to two minor aspects of the administration of the electoral funding laws.

## Part B: No more undemocratic and unfair laws

11. We have provided many submissions to the NSW Parliament and elsewhere relating to why the many incarnations of electoral laws in this state have been undemocratic and unfair for unions and community organisations seeking to comply with them.<sup>1</sup> Our views on these now repealed undemocratic laws have been vindicated by the High Court of Australia.<sup>2</sup>
12. The undemocratic former laws include:
  - a. The halving of the TPC expenditure cap;<sup>3</sup>
  - b. Acting in concert provisions specifically targeting unions and community organisations;<sup>4</sup> and
  - c. The impossibly low expenditure cap of \$20,000 for TPCs in NSW state by-elections.<sup>5</sup>
13. We hope that these undemocratic laws, engineered by the former NSW LNP government, are not resurrected in any form by any current or future government of any persuasion.
14. Part B relates to term of reference (2)(a)(i).

### Part B1: Halving of the TPC expenditure cap

15. In May 2018, the former NSW LNP government passed the *Electoral Funding Act 2018* (EF Act) which replaced the previous *Election Funding, Expenditure and Disclosure Act 1981*. The EF Act were designed to placed restrictions on the expenditure and actions of TPCs in the lead up to state and local government elections.

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<sup>1</sup> See our previous submissions: [Unions NSW, Submission No 5 to Portfolio Committee No. 1 - Premier and Finance, Parliament of NSW, Electoral Funding Amendment Bill 2023](#) (4 September 2023); [Unions NSW, Submission No 8 to Joint Standing Committee on Electoral Matters, Parliament of NSW, Caps on third-party campaigners' electoral expenditure in s29\(11\) and s35 of the Electoral Funding Act 2018](#) (29 April 2022); [Unions NSW, Submission No 20 to Joint Standing Committee on Electoral Matters, Parliament of NSW, Administration of the 2019 NSW State Election](#) (14 October 2019)

<sup>2</sup> *Unions NSW v New South Wales* [2019] HCA 1 ("**Unions NSW No 2**")

<sup>3</sup> EF Act 2018 s 29(10) invalidated by the High Court of Australia in *Unions NSW No 2*

<sup>4</sup> EF Act 2018 s 35 repealed by *Electoral Legislation Amendment Act 2022* (NSW) sch 3 item 12

<sup>5</sup> EF Act 2018 s 29(11), invalidated by the High Court of Australia in *Unions NSW v New South Wales* [2023] HCA 4 ("**Unions NSW No 3**")

16. One element of the EF Act was the halving of the TPC expenditure cap from \$1,050,000 to \$500,000. This law was invalidated by the High Court in *Unions NSW No 2*.
17. This was undemocratic for many reasons. We highlight three of them here. First, the reduction was so large that the effect was that TPCs were effectively silenced compared to political parties, who were able to spend up to \$11,429,700.<sup>6</sup> For example, under the \$500,000 cap, TPCs would not have been able to undertake election advertising to any scale, given the costly nature of the main modern forms of advertising such as TV, radio, and digital. This silencing effect was recognised by the judgments of the various High Court justices in *Unions NSW No 2*, and was the main reason why this law was found to be unconstitutional.<sup>7</sup>
18. Second, the lateness of these changes created significant uncertainty and difficulty for compliance by TPCs. It also created significant barriers to mounting a legal challenge. The changes were made just over 4 months before the start of the capped expenditure period on 1 October 2018. This was not sufficient time for a case to be filed, heard and resolved by the High Court of Australia. Our best efforts in challenging these laws provided us with a result on 29 January 2019, only 53 days before the 2019 NSW state election.
19. Third, these laws came with the potential of jail time (of up to 10 years) and significant financial penalties. It should go without saying that manipulating our laws to potentially jail those who have dissenting opinions is an abuse of power and not what we should expect in a modern democracy such as Australia.
20. As stated in previous submissions Unions NSW believes there are already sufficient safeguards in the existing legislation.
21. Given the High Court's decision in *Unions NSW No 2*, we would caution any current or future government of NSW against attempting to resurrect this law in the future.

## Part B2: Prohibition on "acting in concert"

22. Another element of the EF Act introduced in May 2018 was a prohibition against "acting in concert" which applied to TPCs such as unions and environmental groups, but not political parties. This law prohibited TPCs from "acting in concert", which meant that it was unlawful for two or more TPCs to agree "whether formally or informally" to campaign together where the combined expenditure was in excess of a single TPC cap.<sup>8</sup> This law was eventually repealed by the *EL Amdt Act 2022* in October 2022, after the start of the state capped expenditure period of the 2023 NSW state election.

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<sup>6</sup> EF Act 2018 ss 29(2)-(3), as applicable at the 2019 NSW state election; see also *Unions NSW No 2* [74].

<sup>7</sup> See in particular *Unions NSW No 2* [221]-[222] (Edelman J) and see also [53] (Kiefel CJ, Bell and Keane JJ); [101] [102] (Gageler J); [152]-[153] (Gordon J)

<sup>8</sup> EF Act 2018 35 repealed by *Electoral Legislation Amendment Act 2022* (NSW) sch 3 item 12

23. This law was undemocratic for several reasons, including second and third reasons in Part B1 are also applicable here. We provide an additional reason in this sub-part.
24. The way in which the former NSW LNP government drafted the “acting in concert” provision was unclear and intended to substantially deter the business-as-usual campaigning of unions. As Edelman J accurately pointed out in *Unions NSW No 2*, even 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 the “acting in concert” provision.<sup>9</sup>
25. Given the modus operandi of the union movement is collectivism and many unions do regularly campaign together for workers’ rights, this provision was clearly targeted at unions. In addition, our view is that these provisions were designed to also target environmental groups, who also have a history of campaigning together.
26. While this provision has evaded full consideration by the High Court for various reasons we note the only ruling so far on the “acting in concert” provision is by Edelman J in *Unions NSW No 2* who found the provision unconstitutional. Among other things, his Honour accepted Unions NSW’s argument that “it was clear “what this law is doing” but one simply does not “know why it is doing that other than to shut down that protected speech” of TPCs relative to political parties and candidates.<sup>10</sup>

### Part B3: By-election expenditure cap of \$20,000 for TPCs

27. The EF Act also contained an impossibly low expenditure cap of \$20,000 for TPCs in NSW state by-elections.<sup>11</sup> This law was invalidated by the High Court in *Unions NSW No 3*.
28. On 23 November 2023, the NSW Parliament passed the, which revised the by-election cap for TPCs to \$180,720. While this is below what the JSCEM recommended (75% of the candidate cap) it is a fairer cap and allows unions to communicate workers’ issues to the public more effectively.
29. For the same reasons as Part B1, this law was undemocratic.
30. Given the High Court’s decision in *Unions NSW No 2*, we would caution any current or future government of NSW against attempting to resurrect this law in the future.

### Part C: Administration of the Electoral Funding Act 2018

31. During the 2023 NSW state election, Unions NSW complied with all requirements of the *Electoral Funding Act 2018* (EF Act 2018) and *Electoral Act 2017*. Unions NSW

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<sup>9</sup> *Unions NSW No 2* [185] (Edelman J).

<sup>10</sup> *Unions NSW No 2* [221] (Edelman J).

<sup>11</sup> EF Act 2018 s 29(1), invalidated by the High Court of Australia in *Unions NSW No 3*



submitted an Annual Disclosure of Electoral Expenditure to the NSWEC in September 2023.

32. Like our experience in previous elections, the reporting requirements of the EF Act 2018 required significant administrative investment by Unions NSW. The return involved many weeks of work, with input from several staff members. While Unions NSW has the resources to comply, this is nonetheless an onerous burden. Unions NSW opposes the introduction of any further reporting requirements on TPCs as they have the potential to be an unfair burden on community-based organisations, especially for those organisations that are small and volunteer-run.
33. We wish to draw the committee's attention to two specific aspects of how the EF Act 2018 was administered in relation to the 2023 NSW state election:
  - a. In Part C1, incorrect information from NSWEC about legislative change; and
  - b. In Part C2, reporting of social media content.
34. Part B relates to term of reference (2)(b) and (2)(a)(i).

### Part C1: Incorrect information from NSWEC about legislative change

35. The EL Amdt Act 2022 was passed by NSW Parliament on 19 October 2022 and commenced operation on 2 November 2022. Among the changes was an amendment to what types of electoral expenditure counted towards the NSW state election expenditure caps.
36. A new s 7(4A) of the EF Act provided that for the purposes of the election caps (TPC or otherwise), "electoral expenditure *does not include* expenditure incurred on travel and travel accommodation for candidates and staff engaged in electoral campaigning."<sup>12</sup>
37. At least until 23 January 2023, NSWEC was providing incorrect information about these changes. NSWEC stated that for the purposes of the TPC election cap expenditure incurred on travel and travel accommodation for staff engaged in electoral campaigning *did count* towards the TPC cap, contrary to the changes to the EF Act made by the EL Amdt Act 2022. This included information provided:
  - a. In an information session to unions who were TPCs for the 2023 election on 14 December 2022. The slides provided by the NSWEC did not mention the effect of the new s 7(4A) on the TPC cap and NSWEC was not able to provide a definitive answer when challenged on their interpretation of s 7(4A);<sup>13</sup> and
  - b. In email correspondence with Unions NSW in late January 2023. The NSWEC ultimately confirmed that they agreed with Unions NSW's interpretation on s 7(4A).<sup>14</sup>

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<sup>12</sup> As inserted by EL Amdt Act 2022 sch 3 item 3.

<sup>13</sup>

<sup>14</sup>

38. While we have some sympathy for the difficulty in getting across legislative change, it is important for the regulator NSWEC to familiarise themselves with the legislation for at least three reasons. First, it is the NSWEC's legislative obligation to do so and to provide accurate information to the public on electoral laws. Second, TPCs rely on accurate information being provided to them so they can plan their campaigns accordingly. Third, accurate information is particularly important in this case, especially considering that a violation of the expenditure caps can result in potential jail time and financial penalties.
39. Unions NSW has consistently highlighted the inability for the NSWEC, for whatever reason, to provide advice on determining the legislative requirements of the Act. Unions NSW has been advised previously to seek its own advice on interpretation of the law and, despite doing so, remains exposed to prosecution if the NSWEC deems the TPC to have broken the law.
40. For completeness, the NSWEC ultimately corrected their position in email correspondence on 25 January 2023. However, to get it right only four months after the passage of legislation is far too late. The NSWEC must provide accurate information as soon as possible from the time of legislative change.

## Part C2: Reporting of social media content

41. The Unions NSW disclosure included a large number of transactions with invoices, receipts and copies of electoral material having to be provided to the NSWEC.<sup>15</sup> This proved particularly onerous for social media content spending on across a range of platforms. Unions NSW believes the reporting requirements for small electoral expenses, particularly around social media content, should be relaxed. The nature of how social media content is costed, also increases the administrative burden of recording expenditure.
42. It is overly onerous for copies of all social media content, particularly those with minimal expenditure, to be included with the electoral return. Unions NSW appreciates the value of the NSW Electoral Commission collating electoral material produced by campaigners, but believes a minimum spend threshold should be introduced around this reporting requirement.

## Part D: Conclusion

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<sup>15</sup>

43. TPCs play a crucial role in the electoral process, providing voters with an avenue to collectively pool their resources and raise issues important to them.
44. In considering any further legislative changes, the NSW Parliament should be mindful of the implied freedom of political communication of TPCs.