

REPORT ON PROCEEDINGS BEFORE

**JOINT STANDING COMMITTEE ON ELECTORAL
MATTERS**

**INQUIRY INTO THE IMPACT OF EXPENDITURE CAPS FOR LOCAL
GOVERNMENT ELECTION CAMPAIGNS**

At Macquarie Room, Parliament House, Sydney on Monday 24 September 2018

The Committee met at 11:15 am

PRESENT

The Hon. Dr Peter Phelps (Chair)

The Hon. Ben Franklin

Mr Andrew Fraser

The Hon. Courtney Houssos

The Hon. Peter Primrose

Mr Paul Scully

RACHEL McCALLUM, Director, Legal and Governance, NSW Electoral Commission, affirmed and examined
HUGO BERGERON, Acting Executive Director, Funding Disclosures and Compliance, NSW Electoral Commission, affirmed and examined

The CHAIR: Good morning and thank you for attending this public hearing of the Joint Standing Committee on Electoral Matters inquiry into the impact of expenditure cuts for local government election campaigns. I ask everyone present to switch their mobile phones to silent as they can interfere with the Hansard recording equipment. I now declare the hearing open and welcome Mr Hugo Bergeron and Ms Rachel McCallum from the NSW Electoral Commission. I thank all the witnesses appearing before the Committee today to give evidence. Do either of you have any questions about the hearing process?

Ms McCALLUM: No.

Mr BERGERON: No.

The CHAIR: Does the commission have any opening statements which they would like to make?

Ms McCALLUM: No, we do not.

The Hon. PETER PRIMROSE: Can you tell the Committee what research was done that led to the formula we now have in the legislation for the caps?

Mr BERGERON: No formal research as such. We have obviously looked at the expenditure level at the time of the last local government election, which was 2012, to establish the levels that would be suitable.

The Hon. PETER PRIMROSE: How did you come up with the formula? For example, if there was no formal research, what other jurisdiction did you use to base your calculations on?

Mr BERGERON: To be clear, we did not establish those thresholds, obviously it is a question of policy for the Government. We have advised in terms of the spend of certain candidates at the local government election.

The Hon. PETER PRIMROSE: Are you aware of any other jurisdictions that have a similar mechanism?

Mr BERGERON: Not that I am aware of for local government.

The Hon. PETER PRIMROSE: You are not aware of any research that was undertaken or any other jurisdictions that have a similar system—

Mr BERGERON: No.

The Hon. PETER PRIMROSE: —is that correct?

Ms McCALLUM: The Government may have undertaken research at the time.

The Hon. PETER PRIMROSE: I understand you may not know—

Ms McCALLUM: Yes, we do not know.

The Hon. PETER PRIMROSE: —what Executive Government has done. Many of us find that difficult to comprehend. I am seeking to understand from whence this has come. Am I correct in saying that it came from Executive Government rather than from the Electoral Commission?

Mr BERGERON: It was not a recommendation of the commission.

The Hon. COURTNEY HOUSSOS: Did you provide advice to the Government on other parts of the Electoral Funding Act?

Mr BERGERON: I think it is customary to consult with the commission when the Government would be drafting the electoral funding legislation, yes.

The Hon. COURTNEY HOUSSOS: You mentioned that you prepared some feedback in terms of the figures as to the expenditure in 2012—is that correct?

Mr BERGERON: Exploratory, saying what is the average, what is the mean expenditure by candidates, group-on-group, general data—not testing one particular threshold.

The Hon. COURTNEY HOUSSOS: Would you be able to provide that on notice to the Committee?

Mr BERGERON: Definitely.

The Hon. COURTNEY HOUSSOS: If there was an average spend, perhaps the highest?

Ms McCALLUM: Yes.

The CHAIR: What level of granularity were you asked for? Were you asked for unitary electorates or ward-based council areas or was it just: "What is the average across the State? What is the mean across the State? What is the median?"

Mr BERGERON: We had data per council, from memory, for each of the councils grouped together.

The CHAIR: It is a high level of granularity.

Mr BERGERON: That is it.

The Hon. COURTNEY HOUSSOS: Could you provide on notice what the largest expenditure was across the councils as well?

Mr BERGERON: Yes. For 2012?

The Hon. COURTNEY HOUSSOS: For 2012 and also for the last—

Mr BERGERON: For the last, I can only provide for the first tranche of local government in 2016, because—

The Hon. COURTNEY HOUSSOS: Of course—because 2017 is still undertaking. I understand.

Mr BERGERON: It is actually due today.

The Hon. COURTNEY HOUSSOS: If you could provide them for 2012 and 2016 that would be useful, and any analysis that you provided on those two, either for the Government or you have prepared individually.

Mr BERGERON: No analysis per se but raw information about the expenditures.

The Hon. COURTNEY HOUSSOS: What is the current advice that you are providing to third party campaigners about the acting in concert provisions?

Mr BERGERON: Sorry, I was not prepared for that because that is not part of the terms of reference. Obviously, we have in the material produced advice simply reflecting the wording of the legislation because we do not have a view on whether a certain situation would apply in concert or not. It is brand new to us.

The Hon. COURTNEY HOUSSOS: I appreciate that and I know that there are a lot of third party campaigners who find themselves in the same situation. I understand it is not directly in the terms of reference but if someone is considering registering as a third party campaigner there are quite onerous restrictions on them about acting in concert. I am happy if you want to provide this on notice to the Committee, but any additional publications, any kind of written advice, anything that you have prepared internally to inform people who are registering or who are indicating that they would like to register as third party campaigners would be useful.

Mr BERGERON: I am happy to provide whatever we have produced thus far, which will really be tied to what the legislation is. Obviously, the Electoral Funding Act passed through Parliament at the end of May. Regulations were made at the end of June. All of our material is being updated so I need to track down which especially refer to section 35, I think, of the Electoral Funding Act.

The Hon. COURTNEY HOUSSOS: I know that it is a tight time frame, but if someone wants to register as a third party campaigner they have only until 1 October and there are significant penalties if they do not register by then.

Mr BERGERON: You can register past 1 October but the cap that is applicable to you will be lower, yes.

The Hon. COURTNEY HOUSSOS: That is right. There is an added impetus to registering early but there are also the requirements about acting in concert. Those same provisions that are in place for the State election also apply to local government.

Mr BERGERON: Yes.

The Hon. COURTNEY HOUSSOS: Does the Electoral Commission have a view about what is an appropriate per elector cost for communicating with—

Mr BERGERON: This is a matter of policy, and I do not think the commission would have a view either way.

Ms McCALLUM: No.

Mr BERGERON: No.

The CHAIR: Would it be administratively easier for the Electoral Commission to audit a system which had a per elector figure, or multiple bands of expenditure caps for certain numbers of electors in an area?

Mr BERGERON: It is administratively easier to have bands. First of all, the education of the stakeholder is easier when we talk about actual figures. If we had data per elector, the commission would need to publish a list of all local government areas and the number of electors to arrive at the figure. It would be a little more difficult to educate the stakeholders. We would probably do that through registration and having reference material. In terms of the auditing, it is not significantly more difficult. The ideal model would be very similar because we need to look at each of them per local government area.

The CHAIR: What do you do now? When someone nominates, do you write to them and say, "You can spend this amount on your campaign"?

Mr BERGERON: The legislation took effect on 1 July. There were two local government by-elections at the time that were exempted from the Electoral Funding Act; they were held under the old Act. Two local government elections have since been called. I would have to take the question about what happens at the time of registration on notice. We let the candidates know of their cap for their particular area.

The Hon. COURTNEY HOUSSOS: How many people registered as third party campaigners in the 2016 and 2012 local government elections? I am happy for you to take the question on notice.

Mr BERGERON: In 2016 three candidates lodged a disclosure. There was no concept of third party campaigners in 2012; that was introduced in 2016.

The Hon. COURTNEY HOUSSOS: Who were the three?

Mr BERGERON: Off the top of my head, there were two community groups and one union.

The Hon. COURTNEY HOUSSOS: Can you provide that detail on notice? I would also like the amounts they spent.

Mr BERGERON: Yes.

The Hon. PETER PRIMROSE: It is suggested that one of the possible effects of the current caps would be that where councils have popularly elected mayors there is now an incentive for people to run as both a councillor and also as a popularly elected mayor to take advantage of the higher caps. Can you comment on whether you think that could be an outcome?

Mr BERGERON: I have no evidence to suggest that. What I can say is that of all the disclosures we received at the 2016 election for group candidates and their group, less than 3 per cent had expenditure in excess of \$30,000, which is one of the lower limits. I would expect the vast majority not to be concerned about the expenditure cap. However, I cannot speculate about what people might do.

The Hon. PETER PRIMROSE: Within local government at the moment there is a lot of discussion because people recognise that where there are limited caps for councillors, if you have a people who also run as a popularly elected mayor with no likelihood of getting up, that will allow them to spend additional funds should they wish to do so. That, in my submission, would be an unintended consequence of the legislation.

Mr BERGERON: I do not have a particular view or any information to support that or not to support that position.

The Hon. PETER PRIMROSE: Would it trouble you if that happened?

Mr BERGERON: I believe it is okay as long as the rules are applied equally to all stakeholders. That is certainly the way the commission—

Mr ANDREW FRASER: But you would agree it is possible that could happen under the Act?

Mr BERGERON: There is a possibility. However, in order to be a candidate at a mayoral election, you also need to incur specific expenditure on, for example, how-to-vote material. Without speculating, I can see how someone who is also a candidate for mayoral election would need to spend more on their material, mainly how-to-vote material.

The Hon. BEN FRANKLIN: I refer to the original point about the expenditure caps being calculated on a per capita basis. I understand you may not wish to answer these questions, but I still want to ask them. If you say that you do not want to answer them, that is fine. Would the commission have any views about and would you support in principle a per-capita model being used to calculate expenditure caps?

Mr BERGERON: I do not have any views. The only thing I would say is that it is probably a bit more difficult to administer on a per-capita basis than on strict bands.

The Hon. BEN FRANKLIN: If we did go down the line of implementing expenditure caps based on that model, do you have a view about the sort of figure that would be appropriate per elector?

Mr BERGERON: Not at all.

The Hon. BEN FRANKLIN: In the debate on the bill, which I am sure you are all over, some specific suggestions were made about significant disparity between what could be spent for some electors and on some others because of the current model, particularly in rural and regional areas. There was a particular example in the Central Darling, if I remember correctly, that was quite extreme. Do you have a view or any comments to make about how this model may impact on the enfranchisement and the democratic rights of electors in New South Wales as it currently stands?

Mr BERGERON: I have no comments to make. I will simply repeat the statistic from the 2016 tranche of local government elections, which is that the current caps would have impacted less than 3 per cent of group candidates and less than 1 per cent of independent candidates.

The Hon. BEN FRANKLIN: When you say "impacted", that means they would have spent more than the cap; is that right?

Mr BERGERON: Yes.

The CHAIR: I refer to the operation of the system in 2016. Did you receive any complaints, queries or concerns about how it operated? Given it is the third tier of government and that many people have not been involved in politics previously, what sort of education activities did you provide for candidates and did you receive any concerns or queries? If so, at what level?

Mr BERGERON: We undertake education activities for election events. That includes information on our website when candidates, third party campaigners or any stakeholder registers with us. We will guide them through the various documents we have to support their compliance with the legislation. In terms of 2016, the focus has been on the new rules that came into effect on 1 July. That was the third party campaigner campaign account requirement for local government candidates. There is one that escapes me at the moment. The message was tailored more towards the change in legislation. Many political participants at any kind of election are not fully aware of their obligations. The role of the commission is to educate those stakeholders. Because they have to register with us, we know how to reach them and we do targeted communication to remind them of their disclosure obligations when the time comes and the various rules at the time of registration.

The CHAIR: Would it be fair to say that the commission takes an approach of being educative rather than punitive at a local government level?

Mr BERGERON: We enforce the legislation as well. One of the main offences against the funding legislation is failure to lodge a disclosure or, at the time, failure to appoint an agent. I can assure the Committee that the commission undertakes compliance activities that go to penalty notices or even prosecution in certain cases where there are antecedents.

The CHAIR: How many of those incidents have occurred?

Mr BERGERON: Do you mean failure to lodge a disclosure?

The CHAIR: Yes.

Mr BERGERON: That information is published every year and it is on our website. I am happy to take the question on notice.

Mr PAUL SCULLY: How many candidates across New South Wales were there in 2016 and 2017? I accept that you may have to take that question on notice.

Mr BERGERON: Generally, if it was just all local government areas—I will go back to 2012, because it was an overarching election—I think we had roughly 8,000 candidates. Obviously there are less councils now but there might be more wards, so it is probably around that ballpark, but I can provide you figures.

Mr PAUL SCULLY: Yes; that would be useful. You run information sessions for candidates after their registration and during the campaign period.

Mr BERGERON: Yes.

Mr PAUL SCULLY: How well attended are those? Of those 8,000 roughly how many would have turned up to one of those information sessions?

Mr BERGERON: I cannot say off the top of my head. The main tool that is being used by candidates is the Candidate Handbook that covers funding and disclosure but also covers the running of elections. I guess this is the main tool that is used by candidates out there to get informed about their obligations.

The CHAIR: Just following on, is there a noticeable difference in the administrative competence between those candidates who are branded with a party and those who are Independent?

Mr BERGERON: I really do not have evidence to support either way. Generally speaking, I would say there are more party-endorsed candidates at the State elections than in local government elections. There are a lot more Independents, consequently, at local government elections.

Mr PAUL SCULLY: Of those that you issue to potential penalty and warning notices to, is there more party branded candidates or more Independents?

Mr BERGERON: Sorry, I would not know. One thing I ought to mention is that the party agents—for local governments they are called their election members—is not the person responsible for lodging a disclosure. At State level it is the party agent, so there tends to be more compliance by virtue of the fact that these processes are centralised and done at the same time. That is why we have more failure to lodge, I guess, at a local government level. But even the elected member that is endorsed by a party at a local government level is responsible for their own disclosure, so they are as likely as anyone else, I would say to not lodge their disclosures.

The CHAIR: If we move to a per capita system, how does a candidate know how many electors they have?

Mr BERGERON: If we were to move at such a level, that would be for the Commission. We would probably need to have a guide—a list of local government areas with the number of electors and the equivalent cap to help people comply with their obligation.

The CHAIR: At the current time, after someone has nominated do you send them out a letter saying, "Congratulations, Mr Phelps, for nominating for whoop-de-whoop ward. You have 4,297 electors"?

Mr BERGERON: First of all we send a letter at the time of registration—not necessarily nomination—because registration occurs before and chances are they will incur expenditure between registration and nomination for those that register early. But at the moment I can tell you that we do not tell them how many electors they have because—

The CHAIR: Do they get a copy of the roll for their ward?

Mr BERGERON: I would have to take that question on notice.

Ms McCALLUM: We can take that on notice.

The CHAIR: I would hate to have a situation where someone said, "I don't know exactly how much I am able to spend."

Ms McCALLUM: Yes. That goes to the scheme design if there were to be a change, which would be a question for the Government to work out how to make sure that candidates knew what the number of electors was in their ward or the local government area.

The CHAIR: Is there a cut-off date which would be useful for the commission to say, "Irrespective of the actual number of electors, we shall determine the electors for the purposes of expenditure to be set at this point," whether it is 30 days before the election, two months before the election or—

Mr BERGERON: It needs to be before the start of the capped expenditure period, but I believe that what is currently in the legislation, with a tiered approach, is based on the number of electors at the last general election, which I think is adequate.

The CHAIR: It might not be adequate if you are moving into an area in Western Sydney which has had a whole heap of new housing development appear all of a sudden.

Mr BERGERON: Sorry, I will rephrase. It would be adequate to administer.

The CHAIR: You guys are going to have to administer it. At what point could you go up to? Rather than saying four years ago, could you say—

The Hon. PETER PRIMROSE: Twelve months.

The CHAIR: —12 months?

Mr BERGERON: Twelve months could be suitable. It definitely needs to be before the start of the capped expenditure period, and ideally a little bit before so the Commission can get its message across to the relevant candidates.

The CHAIR: I would point out that a number of councils, for instance, at the next election will have wards that did not have wards last time. So for those types of provisions it would seem 12 months would be a reasonable period.

Mr BERGERON: Twelve months would be enough to administer it.

The CHAIR: More importantly—I am not talking about policy—you would be very happy to administer it if it were a 12-month-out cut off for—

Mr BERGERON: We would be able to administer it; yes. One thing I might add is that it might be worth clarifying whether the non-residential roll needs to be included or not in that calculation.

The Hon. COURTNEY HOUSSOS: That is an excellent point.

The CHAIR: Why?

Mr BERGERON: At the moment I am just having a look at it. I have not been faced with the situation, so I have not formed a view about whether it is or it is not, but we are talking about enrolled electors, which does not seem to be defined further.

The CHAIR: These are things we have to know. If there are administrative issues in dealing with—

Mr BERGERON: I have not turned my mind to it but I can see it being a question, if the legislation could clarify—

Ms McCALLUM: Some councils administer their own elections, as well, and manage their own. They have roll management responsibilities of their own. Those are other issues which we have to factor into it.

Mr PAUL SCULLY: How many councils do that?

Ms McCALLUM: I do not know the number.

The Hon. PETER PRIMROSE: Only a small number.

The CHAIR: It is a handful.

The Hon. COURTNEY HOUSSOS: First I will ask a question about the non-residential roll and what efforts you put in to raise awareness to be on the non-residential roll prior to the elections.

Mr BERGERON: All councils manage their non-residential rolls. The commission does not do any education with regard to the non-residential roll—or no active education.

The Hon. COURTNEY HOUSSOS: So you do not do any management of the roll.

Ms McCALLUM: I might take that on notice in terms of what efforts might be taken by the commission in relation to that, but councils—

The Hon. COURTNEY HOUSSOS: Obviously, if we are going to set the caps 12 months out, and we have a rush of people—particularly on non-residential rolls—just prior to the election, then we want to be able to escalate those activities with an earlier period so that the caps actually reflect the level of electors that they are going to be communicating with. Around third party campaigners again, what kind of outreach work do you do with third party campaigners and the broader community in terms of registering for local government elections—and also for State elections?

Mr BERGERON: We have done the exercise in 2016 because of the introduction of the new legislation. So there are various channels that we use. Obviously, there are those organisations or persons that have registered in the past as third party campaigners for State elections, so we were able to do targeted communication to them. We also published newspapers ads to inform people of new obligations, including third party campaigners. So that is the recurrent message since 2016 around those obligations. Also, I guess, we were looking at who generally becomes a third party campaigner. So we might have done specific information to ClubsNSW or any organisation that would represent a body of potential third party campaigners.

The CHAIR: Did those ads also go in core publications?

Mr BERGERON: In 2016 they were in core publications. I can take the example recently of the new Electoral Funding Act. We published a couple of weeks ago ads in the *Sydney Morning Herald*, the *Telegraph* and the *Australian Financial Review*, and we are doing it again, just to raise awareness of those.

Mr PAUL SCULLY: Do you also do it in community and regional papers?

Mr BERGERON: Yes, we do it in *The Land*, I believe.

Mr PAUL SCULLY: But not in Campbelltown or Wollongong, where there are, often, Fairfax or News Limited papers that are run at a local level? They are not in those?

Mr BERGERON: Not at the moment. We might have done in 2016. I would have to check what exactly is done.

Mr PAUL SCULLY: How frequently do those advertisements run in the lead-up to the registration period?

Mr BERGERON: At the moment, as I said, we will do a few repeats in the publications in September-October, because this is when the pre-election disclosure period starts, on 1 October. Depending on the available budget, we might do a bit more throughout the disclosure period in the lead-up to the election.

The Hon. COURTNEY HOUSSOS: Is information about third party obligations communicated to candidates as well?

Mr BERGERON: There would be mention of third party campaigner [TPC] obligations in the candidate handbook, but not targeted because as you are candidate, you cannot be a third party campaigner as well. It would not be the focus of the message.

The Hon. COURTNEY HOUSSOS: I appreciate that.

The CHAIR: But you may have a relationship with third party campaigners. For example, I am a member of the local save the platypus group—I am not, actually, because I do not care about platypuses that much, but let us assume that I was—and they might support my candidature and I might encourage them to support that candidature. At the same time I could be supporting them in my innocence to do something that is beyond what they are legally allowed to do as third party campaigners.

Mr BERGERON: I am not sure what the question was.

The CHAIR: Caveat emptor. Given the peculiar nature of local government elections and the relative proximity to particularly local issue third party organisations, is it not worthwhile extending the information on the limits of third party campaigning to those people, some of whom may well be involved in those organisations and those organisations may want to support them?

Mr BERGERON: As I mentioned, the material we have informs candidates of their obligations, including TPCs. As I said, it is not our default—

The CHAIR: Are you planning to do that?

Mr BERGERON: Definitely. At the moment our campaign is more around the obligations within the legislation, because there are quite a few that have changed. Our campaign at the moment is very inclusive of the various provisions within the legislation including TPCs and associated entities.

The Hon. BEN FRANKLIN: Could you provide us on notice with a detailed assessment of what the logistical challenges and considerations would be for you to implement the system? What considerations would have to be given if we go down the line of having expenditure caps calculated on a per capita basis?

Mr BERGERON: I think we have talked about all of them.

The Hon. BEN FRANKLIN: I understand; I am asking you to consider further after this hearing and then respond to us in writing, because other things may come up as you discuss this with your colleagues.

Ms McCALLUM: If there are any other issues that might be of relevance, we can take those on notice. That would be the response we would provide, is that correct?

The Hon. BEN FRANKLIN: Yes, that would be great. Secondly, in terms of the new system that currently operates for local government expenditure caps, have you received any feedback on that system?

Mr BERGERON: Not that I am aware of. As I said, it was not in place for the two by-elections in July.

The Hon. BEN FRANKLIN: I understand that, but the legislation has now been passed and those people who are interested may have come to you to provide feedback.

Mr BERGERON: I do know we have received inquiries from stakeholders in the working of these caps, but I do not believe we have received either a complaint or feedback around their application.

The Hon. BEN FRANKLIN: Could you also take that on notice in case you have?

Mr BERGERON: Yes.

The CHAIR: Have any of those queries been related to definitional issues within the new legislation, which you do not feel you have been able to adequately answer?

Mr BERGERON: No specific queries about issues in the current legislation.

The Hon. COURTNEY HOUSSOS: I have a further question on third party campaigners, and I am happy for you to take this question on notice. In terms of the three that registered, are you able to give us a breakdown of how many pursued campaigns in a single ward and how many were broader than that?

Mr BERGERON: They were not required to provide us with that information, so I could not. They were not at the time required to provide us with in which electorate or in which district the expenditure was spent or targeted, so I can only provide you with the information that has been disclosed.

Mr PAUL SCULLY: So they had to register and provide what they have spent; that was all.

Mr BERGERON: Yes.

The Hon. PETER PRIMROSE: In relation to section 31, have you any statistical or other idea of why the number of 200,000 voters was selected as the criterion?

Mr BERGERON: I would not know why.

The Hon. PETER PRIMROSE: A rough guess?

Mr BERGERON: I can only take it that there were only three councils that exceed that number of electors. That is the only thing that I would know.

The Hon. PETER PRIMROSE: It could have been any other number, as far as you are aware?

Mr BERGERON: Yes.

The Hon. PETER PRIMROSE: Can you also tell us what provision there is in the legislation to adjust for inflation in relation to the caps? Is it actually specified?

Mr BERGERON: There is that the adjustable amounts for expenditure caps are reviewed after each general election. They are indexed for inflation for the preceding four years, if you will, and there is a four-year difference between the elections.

The Hon. PETER PRIMROSE: Does that apply to this legislation as well?

Mr BERGERON: That has not applied yet, because we have not indexed, but it will after the—

The Hon. PETER PRIMROSE: I understand that, but there is a provision in this legislation that it will apply?

Mr BERGERON: Yes, I think it is schedule 1.

The CHAIR: I presume just the consumer price index [CPI]?

Mr BERGERON: Yes, CPI for the Sydney region. It is essentially the same provision as the indexation for State expenditure caps.

The CHAIR: Thank you very much for appearing before us today and good luck administering the new system. We may send you some additional questions in writing—in fact, I am sure we will send you some additional questions in writing—and you have taken a number of questions on notice today. Your replies will form part of your evidence and be made public. Presumably you would be happy to provide a written reply to any further questions within 14 days. Is that possible?

Mr BERGERON: I think that is reasonable.

The CHAIR: We are on a sharply tight time frame for the remainder of the parliamentary year, and if you could reply within 14 days that would be most appreciated.

Ms McCALLUM: Yes, absolutely.

(The witnesses withdrew)

(Luncheon adjournment)

LINDA SCOTT, President, Local Government NSW, affirmed and examined

JESSICA WOOD, Legal Officer, Local Government NSW, affirmed and examined

The CHAIR: We now move on to the examination of Local Government NSW. Thank you for making a submission. It was very informative and I am sure there are lots of questions arising out of it. Before we proceed, do you have any questions about the process?

Ms SCOTT: No.

The CHAIR: Would you like to make an opening statement before we move to questions?

Ms SCOTT: Yes. Local Government NSW is the peak body for all of local government in our State. We advocate on behalf of and provide services to councils and other local government organisations such as county councils and regional organisations of councils. We thank the Committee for the opportunity to appear today and are pleased that the Government has referred the matter of local government electoral expenditure for inquiry. The Electoral Funding Act represents the first time that expenditure caps have been placed on the local government sector and, disappointingly, we feel the Act was rushed through Parliament without consultation with local governments and with no local government input into how the expenditure caps would be formulated.

Today, on behalf of the State's 128 councils, I wish to highlight to the Committee a few of our key concerns as conveyed to us by our member councils. First, the Act holds local government electoral participants to a standard of compliance beyond that expected of State government. The expenditure caps, as currently formulated, are inadequate in terms of their consistency, operation and fairness. The expenditure caps will have an adverse impact on the 2020 local government elections if not amended. It is also our view and the view of the legal advice that Local Government NSW has shared with the Committee that the local government electoral expenditure arrangements do not align with the objectives of the Act in which they appear, particularly the first objective: "to establish a fair and transparent electoral funding, expenditure and disclosure scheme."

Local government electoral expenditure caps need to be more nuanced to account for councils' divergent population sizes and to account for other differences between the councils across New South Wales. We are asking that any future proposal be modelled for all 128 councils, including by outlining what each of the proposed expenditure caps would amount to on a per elector basis to avoid extreme or inequitable outcomes. Further, there should be a reasonable period of public exhibition and consultation of the proposals to allow for all stakeholders to have the opportunity to provide feedback.

Our submission provides a few practical examples of the unintended adverse consequences that may arise if the Act is not amended. I will not repeat the information in our submission except to draw the Committee's attention to a couple of key examples. In terms of an inequitable expenditure regime, Orange and Dubbo have similar numbers of electors, yet the Act allows for party expenditure per elector four times higher in Dubbo because Dubbo is divided into wards. At its most extreme, the Act provides that a party in Campbelltown can spend less than 5¢ per elector whilst in Warren shire a party can spend more than \$10 per elector. These distortions are further compounded when candidate and group caps are considered.

Mayoral candidates standing for election in local government areas with fewer numbers of electors are entitled to a substantially higher expenditure cap on a per elector basis. A mayoral candidate in Uralla can spend 33 times as much per elector than a mayoral candidate in Lake Macquarie. The Act also creates an incentive and possible loophole for candidates to stand for election as mayor in order to access a higher electoral expenditure cap than they might otherwise have with no intention to do so, potentially diluting the integrity of mayoral elections.

Another possible unintended consequence arises from the complexity of the local government expenditure caps. The information needed to understand the caps that apply to the New South Wales State Legislature candidates is readily available and quite clearly set out within the Electoral Funding Act itself. In contrast, local government expenditure caps are more complex and require a reliance on external New South Wales government websites to find information on electoral numbers and ward structures. Our submission shows that this information is often inaccessible, contradictory or inaccurate, largely because it is out of date. It is notable that while councils are the sphere of government closest to the community, the electoral expenditure regime for local government is now the most complex to decipher and with which to comply.

Further to this, local government is the only sphere of government without access to public funding for election campaigns. Our legal advice found that there is a real risk that the applicable caps may be misunderstood and unintentionally breached. The democratic process is of course compromised if some candidates for election

incorrectly operate under a higher cap than their opponents, brought about by overly complicated legislation and New South Wales government data that is incorrect or inaccessible.

There are also possible unintended consequences for third party campaigners. The expenditure caps on third party campaigners in local government elections are also concerning when set, as they are, at \$2,500 per local government area. Electoral expenditure caps that are too low do not allow third party campaigners sufficient scope to run campaigns, and effectively stifle the voice of community groups that may campaign on local environmental, development or neighbourhood issues. In 118 of the 128 local government areas in New South Wales, a locally focused third party campaigner could not pay postage costs for a single letter to each elector, to say nothing of printing and other costs that may be involved in running effective campaigns, such as advertising, telecommunications, digital campaigns for the production of other materials relating to campaigning in the election.

Our legal advice also suggests that those restrictive caps may limit third party campaigners' ability to participate in the electoral process and may impermissibly restrict the Constitution's implied freedom of political communication. The Act's restrictions on acting in concert may also make joint campaigns between third party campaigners unfeasible, further impacting the ability of community groups who care about local issues to communicate their messages. Local Government NSW of course supports a move to a more transparent, accountable and fair elections in all spheres of government.

Our priorities on behalf of the State's councils are to have transparent formula proposals that take into account the differences between councils and allow for a reasonable level of electoral expenditure for each council area; broad consultation on the proposals; accessible provisions clearly set out in legislation that promote democratic participation; amendment to the legislation well in advance of the 2020 elections to provide certainty, consistency and fairness for councils and communities across New South Wales. In conclusion, councils and communities deserve certainty, consistency and fairness in elections. We are very eager to work with the Committee and the New South Wales Government to ensure adequate consultation with councils and communities on these matters that go to the heart of local democracy. I again thank you for your time.

The CHAIR: If you could wave your wand, what would it look like?

Ms SCOTT: Given that we have to represent the interests of the whole of the State's councils, we have not put forward a formula because it would be inappropriate for us, as a peak body, to do so. We merely have tried to set out a series of principles by which a potential funding formula could be designed in order to meet the objectives of the Act to have a fair electoral funding system. But as a peak body, we think it is appropriate to have this inquiry and, hopefully, to allow all the different political groupings and independent groupings in New South Wales to participate in that to put forward their own visions for a funding formula.

The CHAIR: But what happens if there are competing interests, not merely in terms of the size of councils but also within the electoral cohort of that council? For example, the Committee could put forward a proposal that says \$1.50 per elector for everyone, and then you will get Independents and Greens saying, "That is terrible because that advantages those people who work together as groupings, either as parties or as pre-existing candidate groupings, in that particular area." Is one of the reasons you are not putting forward a proposal that you realise there is no way we can actually achieve something that everyone will like?

Ms SCOTT: I am confident that the scenario that you put forward is one possible scenario. I am also highly confident that there is a resolution to create a transparent and fair electoral funding formula that will provide a legally transparent system that councils are comfortable with.

The CHAIR: There are many ways in which you can do a transparent system, but my concern is that whatever we do, local government will come out and say, "We don't like this."

Ms SCOTT: Hence we have called for a consultation process where councils—and, as you say within those councils the various groups around the table or a candidate who wished to run—can have an opportunity to express their views.

The CHAIR: But within the submissions we have received from individual councils, there is a variety of different opinions on what should be done.

Ms SCOTT: Correct.

The CHAIR: If we make one group happy, we are going to make another group unhappy, which is why we are relying upon Local Government NSW to suggest that, even though not everyone will be happy, there is a model that is fair and reasonable. But all it appears that the submission says is, "We've got a problem." We know we have a problem, which is why we are having this inquiry, but we do not really know what the solution is.

Ms SCOTT: Our job is to represent the views of our sector, and we are doing that by highlighting that there is a problem and by calling for a fair and transparent system. I am sure that, as a skilful Chair and Committee, you can negotiate a way forward where everybody is equally happy and unhappy with a proposed model going forward. It is not the role of the peak body to offer up a formula.

The Hon. BEN FRANKLIN: That is just wrong. It is the role. It is in fact the exact role of a peak body to do that.

Ms SCOTT: We take a different view to that.

Mr ANDREW FRASER: Surely, as a peak body, and in consultation with your membership, you have an obligation to put forward something that you would feel would be fair across the board.

Ms SCOTT: No. That is not what our members have called for us to do. We have spent a lot of time talking to individual members on this and asking them also to make submissions. I am pleased that many councils have.

The CHAIR: It is just a pity that none of them is actually consistent with each other.

The Hon. PETER PRIMROSE: But, to be fair, Chair—and can I put to you, Ms Scott—one of the reasons we are in this predicament is that it seems as though people have not been adequately consulted in the first place. We have legislation that no-one really understood. When people are starting to understand, we are starting to find a whole range of variables. For example, in recommendation 7, you outlined a number of variables that should have been taken into account and a comprehensive and predictable model presented. That has not happened. What you are suggesting here is that whatever model we come up with, there needs to be full consultation with all the relevant councils.

Ms SCOTT: There should be full consultation with all the relevant councils. The fundamental inequity that has arisen is because of the largely disparate caps that apply on a per elector basis. There is a range of metrics that one could look at when designing a formula—the geographic size, the number of electors, and the wards, et cetera—but a formula must be futureproofed so as not to incentivise, as I said in my statement, everybody running, for example, for mayor to have access to a higher cap; or a council resolving to move to a ward structure in the absence of one in order to access higher funding caps, which currently that move to a ward structure would provide for.

The CHAIR: Rather than precise proposals, can we go on to principles? I think it would be fair to say that you should not be able to game the system by having an additional component for your mayoral expenditure than you would if you were also running on a ticket. With that be fair to say?

Ms SCOTT: We would support that.

The CHAIR: Okay. Could we envisage a system where you would have a cap so that you either had the mayoral amount or your councillor amount, but you should not have both amounts?

Ms SCOTT: We would not support a system where there is an incentive to, like the current Act, have a double cap when running for both positions.

The CHAIR: Okay. Do you think that it is a fair system if you move to a per capita elector basis?

Ms SCOTT: That seems a fairer system than we currently have in the Act.

The CHAIR: Okay. Should that be down to a level of granularity of the total number in each ward—for example, let us do a ward system—or do you think that you could live with a system where you have bands so that, if in your ward there are between 5,000 and 10,000, you would have this much to spend; or do you believe in a strict per capita system?

Ms SCOTT: Local Government NSW would not have firm views on whether or not it be a per capita or total cap as long as it did not produce an outcome where there was an incentive, for example, to move to a ward system or not to game the system. A recent example of that is Shellharbour. There they have adopted a proposal to move to wards for the next local government elections. They will for the first time have wards. We would not want to have a system where the caps for that particular area changed as a result of moving to a ward structure.

The CHAIR: What I am saying is: Would it be better for candidates if we say there are 4,923 voters in the ward, therefore it is 4,923 times a particular amount, or would it be easier to have, if there are a certain number of people in this ward, this is your figure?

Ms SCOTT: Again, I think Local Government NSW does not have a firm view on either of those two proposals, except to say—

The CHAIR: Would it be fair to say then if we do not go to a full per capita system the level of granularity between the levels in each ward should be much closer than they are now? For example, instead of having 200,000 there would be 5,000 or 10,000 elector increments—zero to 5,000, this is how much you can spend; 5,000 to 10,000, this is how much you can spend.

Ms SCOTT: On the surface that proposal does seem to offer a fairer system. Just to go back to another point I raised in my submission, it is also very important that that information about how the formula is set is readily accessible. Because, for example, we make the point on page 15 of our submission, the Local Government Directory at the moment purports to include information about the ward structure. It currently is not up-to-date. The Office of Local Government Local Government Directory is also not currently a reliable source of information. If candidates are referred to that, for example for the number of constituents enrolled in a ward, and that information is not up-to-date, that can also run the risk of candidates inadvertently breaching a cap.

The CHAIR: What if we set a figure one year out from an election as a hit point so that irrespective of any subsequent changes that would be the figure that candidates could work with?

Ms SCOTT: Again that seems to be a mechanism that would promote a fairer system.

The CHAIR: In relation to particularly small wards and small councils, do you believe there is a floor? If we move to a per capita system, there would be the obvious problem that if we are setting a per capita figure for the State, for small areas there would be a situation where communication would be effectively voided because multiplying the per capita figure by the actual number of people would mean it would be very ineffective. Would Local Government NSW accept that there is a minimum amount which can be spent in a campaign?

Ms SCOTT: I think this is a very important point. It is best for councils to speak for themselves on this issue, except to comment that in our consultations with individual councillors generally our feedback from a number of the smaller councils is that they tend to spend nothing or very little on their elections in contrast with the larger metropolitan councils. Perhaps a good guide for the acceptance of councils for that kind of proposal is to look at past expenditure that councillors and mayors have declared. The feedback we get from some of the State's smaller regional councils is that often their fundraising and expenditure is very minimal or nothing.

The CHAIR: The more pointy end of the problem is, of course, the bigger councils and the accusations which will inevitably be faced if we were to move to a raw per capita system is that without an upper limit we are effectively pushing out people who have not run previously, pushing out independents. And The Greens, of course, because they are The Greens, will complain that they are pushing out The Greens. Is there a need for a cap?

Ms SCOTT: Local Government NSW supports a cap.

The CHAIR: Do you not then immediately fall into the same position? How many people do you have in your electorate?

Ms SCOTT: In the City of Sydney, about 200,000.

The CHAIR: For you personally, how many people is your voting base?

Ms SCOTT: We have no wards, so about 200,000 people.

The CHAIR: Two hundred thousand times, let us say for example \$1.50, is roughly \$300,000. You might not necessarily spend that, but if there is a theoretical possibility it could be spent, someone inevitably will one day want to spend that amount. Is there an answer or is there a valid critique that having a \$300,000 expenditure cap effectively rules out Mrs Smith, who is unhappy about the state of her local roads, guttering and parks and wants to run for council on a "fix the roads, guttering and parks" program but is beaten out by major parties who can expend \$300,000?

Ms SCOTT: I need to be very clear that I am not here representing the views of the City of Sydney Council.

The CHAIR: No, but it is a relevant, practical problem that we have to face.

Ms SCOTT: However, I think reference to the past expenditure in the City of Sydney Council elections would guide you to see that the expenditure was of that magnitude in past elections by a range of groups. Local Government NSW does support caps. Having a transparent, accountable system of caps puts some limitation on the proposal that you put forward to limit that.

The CHAIR: Do you not then get back into the same problem which was identified by Local Government NSW previously? Say you have a per capita cap based on the aggregate figure of the number of constituents of 300,000 and then you say, "To keep the playing field fair for the minor players we will put a cap

of \$100,000 on any group expenditure," do you not then immediately fall back into the problem you identified previously of not being able to communicate with the sheer number of electors that you have to?

Ms SCOTT: Yes, that is a difficult balance.

The CHAIR: I do not want balance; I want something from Local Government NSW which tells me, "We are prepared to live with the situation," whether it is ineffective communication with a belts and braces cap on top of the per capita cap or whether you have to say, "Well, per capita is per capita," and if there are a lot of people then that requires a lot of expenditure and the smaller players will just have to suck it up.

Ms SCOTT: If there are particular questions that you would like us to do some direct consultation on with our members, I am very happy to take it on notice and go away and do that.

The CHAIR: Would you be able to do it in 14 days?

Ms SCOTT: Yes.

The CHAIR: Could you do that?

Ms SCOTT: We can consult our members and present you with the responses. I am very happy to take that on notice and do that.

The Hon. PETER PRIMROSE: If you could take this on notice: the issue that was raised before, and you alluded to it, about the concerns under the current legislation where everyone runs for popularly elected mayor because they get double. Let us say there are five wards and the mayor is running for one ward but also popularly elected mayor. If we try to restrict that mayor to only the amount of money that is available to run in one ward, then how can they communicate with everyone covering the five wards of the whole council area? On the other hand, if we allow them sufficient to communicate with everybody in the five council areas, why would everyone not run for popularly elected mayor? It is a dilemma. I do not have a solution but I would be interested if you could take that away and ask your constituents. If we do go to a per capita calculation for expenditure caps, should consideration be given to different situations in regional and rural areas? Would the categories of councils used be, say the Remuneration Tribunal, to determine minimum expenditure caps for different councils? Do you have a view on that?

Ms SCOTT: The Local Government Remuneration Tribunal categories are not always supported by councils. Indeed, in the most recent example of reclassification opportunities, from memory—and I will take this on notice if I am incorrect to correct it—all the councils that sought reclassifications were rejected. This is an example where councils are not necessarily always comfortable with the categorisation that they have been placed in by the Remuneration Tribunal, although that is one obvious metric of classifying the shape and size of councils that is independent of government and of council. I will also take your first point on notice and add to that example: It is also the case in elections where there are not popularly elected mayors that some candidates choose to put themselves forward as the candidate for mayor, even though they are not running in a popularly elected mayor scenario.

A recent example that I recall from the last election was Darcy Byrne at the Inner West Council. Although he was not running in a popularly elected mayoral contest, he declared himself as a candidate for mayor. Therefore, he would have taken the opportunity to campaign in each ward even though he was running as a candidate in only one ward. Again, for the benefit of every group, party and independent candidate, we would not want to limit or to prevent that scenario. A formula should be designed to allow the freedom for candidates to offer themselves up in conjunction, for example, with another candidate and to have a cover off on that kind of scenario.

The Hon. PETER PRIMROSE: I asked the representative from the Electoral Commission earlier if he was aware if caps applied in any other States or Territories, but he did not know. Are you aware of that and what models operate? Do you have any comments about that? Again, please feel free to take those questions on notice.

Ms SCOTT: I have a little bit of information here. If we want to add something, we will take the questions on notice. In Tasmania, the Local Government (General) Regulations 2015 provide for a cap of \$16,000 for a candidate in Clarence, Glenorchy, Hobart, Kingsborough and Launceston, or with between 35,000 to 70,000 people as of 2016, and \$10,000 for a candidate in any other municipal area with a population between 900 and 25,000. Queensland has expenditure cap proposals. On 27 April 2018, the Queensland equivalent organisation to Local Government NSW published "Beyond Belcarra", a one-page policy plan in which it outlined 10 proposals to increase transparency and accountability in local government. That document was named after Operation Belcarra—the Queensland Crime and Corruption Commission investigation into corruption and legislative noncompliance following the 2016 local government elections.

The policy proposal included a plan to limit campaign expenditure to \$2 per voter for a mayor and \$1 for a councillor, capped at \$200,000 and \$50,000 respectively. There was also a floor of \$20,000 for mayoral elections and \$15,000 for councillor elections in undivided councils and \$5,000 for councillor elections in divided councils. The Local Government Association of Queensland is calling on the Queensland Government to adopt and to enact these proposals. We have some other examples that I can table from New Zealand and the United Kingdom, which also have caps that apply based on categories of population in the electoral area.

The Hon. PETER PRIMROSE: The Committee would probably be interested in that information.

The CHAIR: It would be very good if you could table it.

The Hon. COURTNEY HOUSSOS: Thank you very much for your submission and your time today. The feedback we received from the Electoral Commission is that we would need to set the time frame if we were to move to a per-capita basis of any description. We would need to give the Electoral Commission a fair amount of time to implement it. The Committee seemed to get some kind of agreement that 12 months out would probably be appropriate. Obviously councils maintain their own rolls. Are you aware of what work happens in that last 12 months before an election to get people onto the roll? Could that be moved forward to ensure that the census date for the data does not get skewed by work done after that date? Obviously you are not representing the City of Sydney, but anything you are aware of at the City of Sydney would be useful.

Ms SCOTT: The legal advice we received in relation to this Act said very clearly that the amendments to this legislation should be made before the March State election in order to maximise the amount of time that local government candidates had for fundraising clarity. Some candidates for the 2020 election have already begun fundraising. Generally it is our position that the longer we are given to provide clarity the better. Again, I can take on notice getting more specific information in relation to the creation of rolls.

However, my own council—the City of Sydney Council—has an electoral requirement to keep the business register that informs the electoral roll up to date at any one time. The City of Sydney has previously expressed very strong concerns about its ability to do that given that the law currently requires that if a lessee moves on from a property it is the council's responsibility to know that on a day-to-day basis and to keep its rolls up to date. Whenever an election is called it must provide that information to the Electoral Commission so those electors can be deemed to be on the roll. That is a complex process and the City of Sydney has expressed concerns in public submissions about its ability to do that. I can take that question on notice and provide more information.

The Hon. COURTNEY HOUSSOS: I am particularly interested in councils in newer growth areas that will see a dramatic increase in their number of electors. If they were to do any kind of work to get people on the roll, that might not happen until after that census date. Do you have any thoughts about that? Does Local Government NSW have any thoughts about third party campaigners, what would be the appropriate level of cap for them, and how could we implement that across the State?

Ms SCOTT: I refer back to my statements in my opening remarks, which I can table.

The Hon. COURTNEY HOUSSOS: That would probably be useful for Hansard.

The Hon. PETER PRIMROSE: Section 31 of the legislation mentions 200,000 electors. The Electoral Commission could not shed light on why that figure was selected. It seems almost arbitrary. Can you shed any light on that and do you have any views about why that figure is in the legislation? On the other hand, do you also believe it is possibly arbitrary?

Ms SCOTT: We are not consulted on that figure or on the formula. I do not have any more information on why it was used. We certainly have councils that have more than 200,000 electors. The Central Coast is an example of that. At 24 August 2018, the council had 251,690 electors. It certainly is the case that there are councils in New South Wales with more electors than that.

Mr ANDREW FRASER: You indicated earlier that you had consulted with some councils. Has the association consulted with all member councils in relation to this? If so, what sort of response did you get?

Ms SCOTT: We have sought to inform our councils that this is occurring and encouraged them and the political groupings that may run candidates to lodge their own submissions so that the Committee sees the full range of views across the sector. As the Chair indicated earlier, around any sitting council table there may be differing views depending on the different groupings. As part of our regular consultation with our members, we have spoken to them about the need for an inquiry and our happiness that this inquiry has happened. We have also sought their views about Local Government NSW making a submission. They certainly supported that.

As I said earlier, I think the only other point that has been drawn to my attention as part of that consultation has been about the relative levels of existing expenditure in elections, and the diversity in existing

expenditure in some of the smaller regional councils compared to the very large metropolitan councils. That point has been highlighted to me on a number of occasions. Above and beyond that, where there has been diversity of opinion, we have encouraged councils to put their own views.

Mr ANDREW FRASER: So there was no suggestion from you that they should come back to your association, where a comprehensive response on behalf of those councils could be made in a single document from yourselves?

Ms SCOTT: We have very clearly received a message that there are differing views about what the formula should be and hence have encouraged the councils and the groupings to put forward their own submissions. It is the case that we have put the view that there should be caps. That has been a consultation and discussion with councils, as well. We have received consistent feedback that that is a united view within the sector. That is quite an achievement, given the 128 councils in the sector. So there is support for that proposition as long as the funding formula is meeting the objectives of the Act to provide a fair and transparent electoral funding system.

Mr ANDREW FRASER: Was there a disparity in relation to smaller regional councils and the likes of Sydney or metropolitan councils?

Ms SCOTT: With respect to the question about caps?

Mr ANDREW FRASER: Yes.

Ms SCOTT: The feedback from a number of small regional councils was that they did not oppose caps. They were not relevant because they did not fundraise or fund electoral campaigns, but they were not opposed to caps.

Mr PAUL SCULLY: Were they concerned that they might become relevant if the level of the floor increased for them—the minimum spend? Were they concerned that suddenly someone may decide to spend up to a cap or did that not really factor into the consideration?

Ms SCOTT: It is not something that has been raised with me personally to date.

The Hon. BEN FRANKLIN: Can I go to your recommendation 7, points (a) and (e), where you say that some variables should be taken into account including the geographic size of the council and whether the council is metropolitan or non-metropolitan. If we go to a per-capita model, would you advocate—noting the premise of both of those two points—that there should be some sort of loading put on expenditure caps for physically large councils, particularly in regional areas?

Ms SCOTT: We can take that on notice if you would like us to do some specific consultation with our members within a fortnight. We can consult them on that.

The Hon. BEN FRANKLIN: I assume you are not saying that a smaller council should have a higher expenditure cap. When you say "geographic size" you mean bigger—right?

Ms SCOTT: Yes.

The Hon. BEN FRANKLIN: Okay. Yes, I would be grateful if you could come back to us and let us know. Obviously, if we go down this per capita line we would be—perhaps even on a broader level—interested to know, on that assumption, what other factors you consider, or your association considers, should be taken into account to potentially add on to a purist per capita model?

Ms SCOTT: We will take it on notice to do some further consultation on that.

The Hon. BEN FRANKLIN: Thank you.

The CHAIR: Thank you very much for appearing today, and for your submission. We may send you some additional questions in writing, and you have taken on some questions on notice from today's hearing. Your replies will form part of your evidence and be made public. Would you be able to provide a written reply to these questions within 14 days? It is quite short, but we are on a short deadline if we want to make the legislative sitting week schedule.

Ms SCOTT: Yes.

(The witnesses withdrew)

MARK MOREY, Secretary, Unions NSW, affirmed and examined

KATE MINTER, Research Officer, Unions NSW, affirmed and examined

The CHAIR: Before we start the questioning are there any opening statements either of you would like to make?

Mr MOREY: Yes. Thank you for the opportunity to appear before the inquiry. Unions NSW has been very vocal in its concerns about the Electoral Funding Act and the restrictions placed on third party campaigners' participation in elections at both State and local government levels. Local government elections are not an area unions spend a lot of time campaigning in. However, it is crucial that unions and other third party campaigners, such as churches, charities, community groups and environmental groups, are provided with the opportunity to participate in the electoral process and to voice their concerns to decision makers in the lead-up to elections.

Unions NSW supports an electoral system that maintains the confidence of the community while upholding democratic values and the right to freedom of political expression. The current calculation of caps in both their rate and their application do not allow for the meaningful participation of third parties; nor do they have equitable outcomes for candidates running for local government. Unions NSW proposes an expenditure cap be set on a per-enrolled-electors basis, with the same caps set for third party campaigners and candidates. The caps should take into account the diversity of local government areas around the State as well as the actual costs of running a campaign.

After making an initial submission to the Committee, Unions NSW has revised our position. An updated copy was sent to the Committee on Friday. Unions NSW believes that the expenditure caps for third party campaigners should be applied at a State level and then calculated on the number of local government areas actually holding elections. This reflects the issues-based nature and the complications for third party campaigners. For example, a third party radio advertisement regarding the negative impacts of privatisation on local government services may be targeted at three local government areas but, due to the broadcast areas, may well play across three or more local government areas.

It is difficult to know how the spending should be then apportioned—that is, would it be justified across the three or multiple local government areas, or to the number of wards or a combination of wards and areas? Would the dominant or target audience be considered? Would the listener numbers need to be collected and applied? To prevent third party campaigners from spending their entire cap in one or two local government areas, the caps should mirror the approach of the State election caps, which places a cap on the amount of electorate-specific spending. For spending to be considered local-government-area specific it must mention the names of candidates, wards or the local government area.

I would also like to take a moment to raise the acting-in-concert provisions included in the Act, which restrict third party campaigners at a State and local government level. Restrictions on acting in concert impermissibly burdens the freedom of political communication implied by the Constitution. The Committee will be aware that Unions NSW is currently challenging the constitutional validity of this section of the Act. I wish to reiterate our opposition to this provision and urge the Committee to recommend its removal from the Act.

The CHAIR: I will start off with one question. I understand from your revised submission that you are recommending a statewide cap on third party campaigns.

Mr MOREY: Yes.

The CHAIR: Let us say it was set at \$250,000 across the State; what would stop, say, the Colong Foundation spending \$250,000 in the local government area for Blue Mountains to get The Greens elected at the expense of the Labor Party and other candidates there?

Mr MOREY: What we are saying is that would not be an issue, because you would be just targeting one area. You would obviously mention the candidates in the area.

The CHAIR: What if the campaign is just "Protect the beauty of our national parks"? I quite like the idea of the statewide cap; I am just trying to find out what things you would have in mind to stop the gaming of the system, so that particularly local campaigners or statewide campaigners with a local focus did not just dump the whole \$250,000 into one electorate.

Mr MOREY: That is where we came up with our suggestions that talks about specific local government areas, specific candidates or specific wards. I take your point about a campaign specifically about national parks in the Blue Mountains—

The CHAIR: Which would be quite popular amongst certain population groups.

Mr MOREY: That is the conundrum that we had between issues-based campaigns broadly and being narrowed and focused on a local government area. In our considerations that was the best way we could think of for stopping that gaming. When it becomes specific to a local area, that means you have to flip out being an issued-based campaign to a specific local government campaign and be subjected to different funding levels.

The Hon. COURTNEY HOUSSOS: Your submission is great, as is your revised submission; thank you very much for sending it through. I reiterate my support for the position taken by the Chair when he noted the need for a statewide cap with provisions for localised campaigning. Obviously, third party campaigners are a key part of caps, and while we want to prevent the arms race we also want to make sure we are enfranchising individuals and, particularly when it comes to local government, allowing smaller groups to participate in the process. On that, you have told this Committee in a previous hearing, but can you put on the record some of the work that you had to do as a third party campaigner at the last State election and the advice that you provided around your compliance and what that cost in order to meet your legal obligations?

Mr MOREY: From memory, it cost us about \$70,000 to account for our electoral spending. We had one, if not two, people working full-time to ensure that we complied with the legislation. We kept the appropriate receipts to manage that process. We then spent a large amount of time advising our affiliates and taking them through what we understood was the legal advice that we had received on how to manage our accounts and comply with the legislation. Again, they did similar things by having their audits done on additional costs.

It is complicated and you have to keep every receipt. It becomes a financial burden if you are not a large enough organisation to be in a position to make sure that you are complying with the legislation. If I was a small anti-development community organisation, or something like that, trying to comply with spending money on campaigns, it is very complicated. You would want a good accountant on your committee to look after it. We have said before that complying with the regulation, while it is trying to stop something, should not become an impost on being able to participate in the democratic process. The way it is structured now, it is a regulatory nightmare trying to comply with it.

The Hon. COURTNEY HOUSSOS: I asked the Electoral Commission what advice they are providing to people, particularly around the specific provisions. Can you no longer provide that advice to your affiliates?

Mr MOREY: I will give you an example. We had a briefing last week from the State Electoral Commission. We asked them to brief unions on how the new legislation works. We got no answers. They repeatedly said, "We don't know; we're not sure how this is going to work out." We asked them specifically about electoral material and whether it was or was not campaign material. They said they did not know. We said, "How will we deal with it?" They said, "Possibly you will have to do it on a case-by-case basis."

As with the previous Act, trying to get directions from them is virtually impossible. I have told our staff to put everything in writing and to keep every response we get, so that if we do get in a situation where we have breached the legislation, not because of trying to but because we made a mistake, we have documentation that proves that we could not get answers or guidance out of them. Our affiliates ask us for similar guidance, and we tell them we cannot give them guidance because we cannot get an answer. They say, "You've got to be kidding me! There's this legislation and you cannot tell us what to do." I say, "Unfortunately, we can't." We are erring on the side of caution in everything we are doing.

The Hon. COURTNEY HOUSSOS: There need to be clear guidelines coming from the Electoral Commission and there needs to be clearer support provided, particularly when imposing these things on the third parties.

Mr MOREY: Absolutely. We are a large organisation that has done this for a long time and has been involved in the political process. If you are a community group running campaigns and putting out material, I am not sure where you get the guidance from on what and is not electoral material and whether or not you are breaching the Act. It is a real problem.

The Hon. BEN FRANKLIN: It is not just third parties that have a challenge with the Electoral Commission.

The CHAIR: Every political party does exactly the same thing—put it in writing. For your potential statewide figure, what amount would you think would be reasonable for a third party campaigner?

Mr MOREY: We sort of hesitate to put in an actual figure, because it is very complicated. We are trying to work on what it actually costs to run a campaign and at least have one mail-out in a local government area.

The CHAIR: If you are doing a statewide campaign with 7 million voters, that would be \$7 million. I am not sure we are going to recommend \$7 million for third party campaigners.

Mr MOREY: No, and I do not think we would ever spend \$7 million on a local government campaign.

The CHAIR: I do not know; United Services Union [USU] might.

Mr MOREY: We have spoken to them and they have not historically put large amounts into local government campaigns either. The nature of local government campaigns in different areas is difficult—whether you are campaigning across a whole area or you break the area up into wards, it is fairly hard to get involved. An instance for us would be if all councils decide they want to privatise all their works and how to fund that campaign. We toyed with \$1 per elector, but it is hard to say. The rule of thumb for us is, can we get at least one mail-out done to everyone in an electorate, if not two?

Ms MINTER: There are some fixed costs particular to specific local government area campaigns where we are talking about specific candidates for local government areas. There are fixed costs that do not go down based on being a third party campaigner and not a candidate. For instance, mail-outs do not change costs and there is a minimum spend if you want to send anything at all by mail. It is hard to put a proportion or a dollar figure, but it would have to be set in a manner that did not completely restrict the ability to participate.

Mr MOREY: If you work it out, on a mail-out you get to a large figure anyway—you are talking \$4 million-plus at least. The flip side of that is, how do you communicate with everyone in the State if you have a single third party issue?

Mr ANDREW FRASER: Is there no ballpark figure in relation to this type of campaign?

The CHAIR: The problem is if you have \$1 per elector and an additional belts-and-braces approach of saying you cannot spend more than a certain amount in a certain ward or a certain council area, that immediately imposes an administrative burden to prove that you have complied. As you say, if you have a radio station with a three-council footprint and you are only really interested in one, how do you hypothecate the figure?

Mr MOREY: That is right.

The CHAIR: Do you have any suggestions as to how we might do it?

Mr MOREY: We went around and around, and that is why we came back to the figure for every elector in the State. It is the most administratively easy way to do it for a third party campaigner.

The CHAIR: The problem is that then you are left with such a big figure that the Colong Foundation, say, might try to dump it all into one electorate.

Mr MOREY: The complexity we stumbled over was that you have local government areas set up in different ways. Some do not have wards; some have wards. How do you balance that out? On the example of the popularly elected mayor that you raised, our thoughts are that you either have to say that you are going to run as a councillor or you are running as a popularly elected mayor and then you are allocated an amount and you cannot double up on it.

The CHAIR: I think we have a unity ticket on that one.

The Hon. COURTNEY HOUSSOS: Obviously, for a State election you have a statewide cap. While we on this Committee would disagree about the level of the cap, do you think where it has been historically would be enough for a local government campaign? I think it is about a million bucks.

Ms MINTER: Maybe we will take that on notice.

The Hon. COURTNEY HOUSSOS: That would be useful—and obviously consult with the USU because they are the ones running an issue-specific campaign and not necessarily always a local-specific campaign.

Mr MOREY: We had that discussion with them. The size of that campaign may be across three or four councils where they want to run an issue; not the whole State. I think it would be very rare that a third party campaigner would run a statewide campaign, but it is not out of the realms of possibility, so you have to have something in place to deal with that as well. The complexity of trying to work that out—we are looking at your eminent people to come up with that. But we did spend a lot of time trying to think it through and for us as third party campaigners we ended up with a per elector figure and having some safeguards around it so someone cannot dump it in one electorate or one local government area. That is all we could come up with.

The Hon. COURTNEY HOUSSOS: That is very well thought through, to be fair.

The CHAIR: I agree with it. We know what to do, but how do we do it?

Ms MINTER: The difficulty with third party campaigners is that we do not have a lot of experience running third party campaigns at the local government level as unions so we cannot really reflect on what the actual costs would be. The fact that there has not been a requirement for expenditure to be disclosed until recently makes it really hard for us to look historically at what other third party campaigns have spent. But our recommendations in the submission were that the levels set for candidates should look historically at what the spends have been. We would be looking for some guidance from prior spending.

The CHAIR: I think they did and the low level that was spent was basically designed for the friends of whoop-dee-whoop creek to spend \$2,000 for to campaign to "Vote for these candidates because these candidates support whoop-dee-whoop creek."

Mr MOREY: And most of the handouts on the days that they produced would have been done on a photocopier in someone's community centre and not calculated and just handed out on the day.

The CHAIR: That is right.

Mr PAUL SCULLY: With the question of where you draw the line between a statewide campaign and a local issues campaign—for example, the Blue Mountains National Park—you could run a whole-of-State message about saving the national park, but if you only target it at one media market, for instance the Blue Mountains, you are only ever go to find that out after the fact, largely.

Mr MOREY: Yes.

Mr PAUL SCULLY: We are going to have to go through this ourselves, but what was your rationale for how you drew the line between a statewide campaign with statewide messages and a local issue, even though the messaging might have been the same?

Mr MOREY: That is why we moved to having those provisions in there where you start naming candidates and councils.

The CHAIR: Candidates, electorates and geographically identifiable places.

Mr MOREY: Yes, then it is no longer an issues-based approach.

Mr PAUL SCULLY: But you could avoid that by just saying, "We love national parks." And if you only brought your "We love national parks" advertising in one small media market—?

Ms MINTER: Our proposal was mirrored off what is currently in the Act and applied to State elections. We were just proposing that it be replicated at a local government area level.

The CHAIR: You have identified a fundamental problem there too, and that is that if you want to dodge the existing provisions you can by having a generic message but expenditure in only a single geographic area, which would mean we would have to move to an additional level of regulation which looked at where you expended the money, which is—

Mr MOREY: Then you have the Sydney metro market which is prohibitive for advertising anyway. But then you get outside the Sydney metro area because you have obviously got designated media markets and media buyers outside of Sydney, Wollongong and Newcastle, where you be able to determine what people are actually saying.

The CHAIR: Not necessarily, because you have Wagga Wagga—just to pick an area at random that we might have had some experience with in recent times—Tumut, Lockhart, Tumba and Junee.

Mr MOREY: The other thing you can do down on the border is book your media buy in Victoria—not New South Wales—and run it in that way. How does that work?

The Hon. COURTNEY HOUSSOS: But if your cap for a third party campaign is not high enough then you are effectively excluding your third party campaigners from doing any kind of radio or any kind of meaningful advertising. I do not know the last time we saw local government advertising on television, but at least we are giving people the option of spending their money how they want.

Mr ANDREW FRASER: If it was issues-based and statewide, we have Laws and Hadley, who go to pretty much every part of the State, so that would not work.

Mr MOREY: That was the problem we saw when we sat down and worked out the media buy-in. Because if you are only targeting three local government areas but run it across eight of them, how do you

apportion it to where? Do you say in the other five electorates that no-one was listening because it was not relevant to them?

The CHAIR: That is not valid.

Mr MOREY: No, it is not, and that is the problem with it. That is why we came back with the simplest thing we could think of, and that is relying on what is in the Act at the moment at a State level and trying to apply it at a local government level. As an aside, it would be good if they cleaned up the local government area so everyone was the same—either you have got all wards or no wards—so there is a little bit of consistency.

The CHAIR: We will leave that to Unions NSW.

The Hon. BEN FRANKLIN: If you could take a lead on that campaign that would be great.

Ms MINTER: From our perspective, our real preference is for a simple system. It is really difficult to engage with this if it becomes overly complex in how it can be applied and it really turns smaller groups off participating. Our preference for a proposal was to make it as simple as possible. I also note that, particularly for third party campaigners, with regard to accessibility, if we were to move to a per elector figure there should be very clear guidance on what the number of electors in each local government area is because even things that are simple become quite difficult.

The CHAIR: I think we are already moving in that direction. There will be set figures so you would not get caught thinking you have 7,000 electors when you only have 6,500.

The Hon. COURTNEY HOUSSOS: This morning I asked the Electoral Commission representatives about what kind of awareness raising they are doing for third party campaigners and the obligations on them and they said they had done some advertising and other bits and pieces but were not actually giving the information, limited as it is, to candidates, which would be a means, particularly in local government elections, of getting information out. Do you think there are any other ways they can be getting information out there to third party campaigners? I am happy if you want to take the question on notice. I think now we have caps that apply to third party campaigners and quite onerous obligations on them it is important that they are getting the information so some whoop-dee-whoop creek group does not inadvertently end up getting prosecuted for doing something they have done in every local government election.

Mr MOREY: I will give you an example of that. Last week I sent out a circular to all our affiliates—all 60-odd of them—saying that if they want to be a third party campaigner they need to register by Friday this week. I got a number of calls saying "What is third party registration?" Even amongst our membership people are saying, "What is this stuff?" If you are in whoop-dee-whoop creek you have no chance.

The Hon. COURTNEY HOUSSOS: That is very valuable feedback, thank you.

The Hon. PETER PRIMROSE: How does an organisation like yours or any other third party deal the situations that arises when you ring up—and we have all done it—the Electoral Commission to seek information and are told that it is not available, and when you say, "Look, I am going to get into trouble" the advice is "You need to seek legal advice", which means it will eventually be sorted out in court? How do you deal with that? What does that mean for people running in the democratic system if the Electoral Commission—the relevant authority that is supposedly able to give you final definitions—cannot give it to you.

Mr MOREY: It is really problematic. We are in a position where we can get legal advice. We talk that through and then we err on the side of caution and act in good faith based on what is an appropriate decision. We keep materials and document why we are doing what we are doing. For us, in the upcoming State election, we have talked about keeping internal timesheets for our staff that they have to fill out to say whether they are working on a campaign or their normal daily work. We are going to have to put books together, because if after March we end up in trouble and the Electoral Commission sends us a letter saying, "You have breached the cap because you have had everyone working on this" there is no point then coming back and trying to work out what we did and did not do. We have to be proactive about it.

That is us, and we have legal advice and have spent a lot of money getting it and thinking about it, being in the political system. If you are a local candidate having a crack or a local third party campaigner having a crack, you are not going to have the resources, time or information to do that. That is the problem with the Electoral Commission. The information is not out there and just one or two ads in a paper are not going to alert people to the requirements. It is just not going to happen.

The CHAIR: To be fair, it is an executive agency so it does not have any legal ability to interpret the law—that is reserved exclusively for the courts.

Mr MOREY: That is right.

The CHAIR: There might be a role, for example, in advisory opinions on the basis that, "these have no legal standing but this is what we believe the legislation means", which could then subsequently be used by people who find themselves before the courts allegedly in breach of the Act. Do you think there is greater scope for that?

Mr PAUL SCULLY: To prove that they acted in good faith.

Mr MOREY: It is kind of like being in a scene from *Utopia*. "We have this legislation that has been passed. Can anyone tell us what it means?" "No, but we can tell you once we start prosecuting you."

The CHAIR: Technically no-one except the courts can tell you what any legislation means.

Mr MOREY: No. The courts can make a decision on the interpretation of it, but there has to be some capacity within the organisations that are funded to administer the Act to be able to provide some level of guidance on what they believe is appropriate behaviour under the legislation. Now, whether that is with a qualifier that says, "This is then subject to further prosecution", or something, but then it allows a campaigner—

The CHAIR: To make a reasonable assessment?

Mr MOREY: —to actually say, "I have sought out information. I have got legal advice. I have kept my books appropriately. I have tried to do everything I can to comply with the legislation, and my defence is that I don't believe there is anything else I could have done. Unfortunately, we have not complied for X, Y, Z reason." Then the courts can make a decision and take that into consideration, but at this point you cannot even get, "I think this is maybe the situation you face."

Mr PAUL SCULLY: What were the most basic of questions that they could not answer for the affiliates the other day? Where did you have the briefing? Was it the most simple of simple questions in terms of what you can and cannot do?

Mr MOREY: Yes.

The CHAIR: The first question is, "What is a third party?"

Mr MOREY: Yes. Is this electoral communication or not? What is the difference between Unions NSW running a campaign on privatisation, say, of an asset during the election period when we do not tell anyone to vote, but we are saying that this is a problem and this should not go ahead. Is that electoral communication because you are telling people that the Government is doing something it should not be doing and trying to inform people, and is that telling people to vote a different way if they want to stop it? The corollary of it in the end is we are telling people this is a bad thing and it should be stopped, and the only way to stop it is to vote the Government out. Is that then campaigning as a third party campaigner on that issue? They said, "We don't know. We'll have to take it on a case-by-case basis."

The CHAIR: That is a political communication.

Mr MOREY: That is right.

The CHAIR: Any communication on a political issue, even if it is not direct advocacy for a vote. It is still, as long as it can reasonably be seen to be a communication on a political issue, is a political issue still.

The Hon. PETER PRIMROSE: I am glad that the courts can make that determination.

Mr MOREY: Yes, because that is not necessarily so.

The CHAIR: That is certainly under the Federal system.

Ms MINTER: Another example they gave us was whether or not something is considered electoral communication depends on whether it is communicated with the members of an organisation or the broader public. When we asked for greater clarification on what distinction that actually means in practicality, if you are only communicating to members, does that mean that it is less likely to be electoral expenditure?

The CHAIR: No.

Ms MINTER: They could not provide any guidance on how it would affect it, just that it would affect it. It was very unclear as to how that even is a factor or what kind of influence it would have over the decision.

Mr PAUL SCULLY: Conceivably, then, you send it to someone's home and their son or daughter, who is not a member of a union or involved, picks it up and reads it. Have you done two forms of communication?

Ms MINTER: It was unclear.

Mr MOREY: It was unclear.

Mr PAUL SCULLY: Incredibly helpful!

The CHAIR: Let's just move to laissez-faire, no rules.

Mr MOREY: Oh, well, arguably. We might be on a unity ticket there.

The CHAIR: I just make it clear that that is not the official Government position.

Mr MOREY: I can only be guided by the Government on this one.

The CHAIR: Good heavens, I am agreeing with Unions NSW. There goes my preselection.

Mr MOREY: Again!

The CHAIR: Are there any further questions?

Mr PAUL SCULLY: No.

The CHAIR: Thank you very much for coming here today. It has been very good. The information has been very useful.

Mr MOREY: Thank you, Chair. I appreciate that.

The CHAIR: You have raised a series of issues which I think it is quite clear need to be looked at. Thank you very much for coming in and for your submission.

Mr MOREY: Thank you very much, Chair. Thank you, Committee.

(The witnesses withdrew)

(The Committee adjourned at 13:43)