REPORT ON PROCEEDINGS BEFORE

JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

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

At Room 814 / 815, Parliament House, on Wednesday 27 July 2022

The Committee met at 10:30.

PRESENT

Mr Lee Evans (Chair)

Legislative Council	**Legislative Assembly**
The Hon. Robert Borsak (Deputy Chair)	Mr Paul Scully
The Hon. Courtney Houssos	
The Hon. Peter Primrose	
The Hon. Chris Rath	

PRESENT VIA VIDEOCONFERENCE

The Hon. Scott Barrett	Mr Kevin Conolly
	Mr Nathaniel Smith

* Please note:
[inaudible] is used when audio words cannot be deciphered.
[audio malfunction] is used when words are lost due to a technical malfunction.
[disorder] is used when members or witnesses speak over one another.

The CHAIR: Good morning, everybody. Before we start, I'd like to acknowledge the Gadigal people, who are the traditional custodians of this land. I pay my respects to Elders of the Eora nation past, present and emerging, and extend that respect to the Aboriginal and Torres Strait Islander people who are present or who are viewing the proceedings online. I'm Lee Evans, Chair of the Joint Standing Committee on Electoral Matters. With me today is Deputy Chair the Hon. Robert Borsak, the Hon. Peter Primrose, the Hon. Courtney Houssos, the Hon. Christopher Rath and the member for Wollongong, Mr Paul Scully. We also have joining us via videoconference Mr Kevin Connolly, the member for Riverstone; Mr Nathaniel Smith, the member for Wollondilly; and the Hon. Scott Barrett. This hearing is for the Committee's inquiry into caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018*. We have witnesses taking part via videoconference, and also attending in person at Parliament House. The hearing is being broadcast on the Parliament's website. I thank everyone for appearing before the Committee today and we appreciate the flexibility of everyone involved, especially those attending via videoconferencing.

Mr JOHN SCHMIDT, Electoral Commissioner, NSW Electoral Commission, affirmed and examined

Ms RACHEL McCALLUM, Executive Director, Funding, Disclosure & Compliance and General Counsel, NSW Electoral Commission, affirmed and examined

Mr HUGO BERGERON, Director, Compliance, NSW Electoral Commission, affirmed and examined

The CHAIR: We will now begin with the first witnesses. Would you like to make a short opening statement before we begin the questioning?

JOHN SCHMIDT: Thank you, Chair—if I could just have a very short opportunity. I just wanted to flag for the benefit of members and, through you, that I value this window the Committee provides me to the entire Parliament. I want to flag a couple of issues that I've raised with the government, and that the government is considering at the moment, in the context of the Electoral Legislation Amendment Bill, which is currently before the lower House. In sequence, the primary issue—I've asked the government to consider an urgent amendment and I will be having broader discussions about that, but I'm more than willing to discuss with any party or member who wants to talk about this in more detail. We face an issue which the Australian Electoral Commission faced at the federal election. Legislation was passed at the federal Parliament to address it. It relates to the prescriptive language in the Electoral Act in New South Wales about the production of the material which goes out for postal packs.

At the moment the inner envelope, which electors are required to put their ballot papers in, has to have affixed to it the postal vote certificate. It's a purely logistical problem. At the 2019 election we took about 250,000 postal votes. The federal government in New South Wales at the recent federal election took 676,000. It is physically impossible for the suppliers that we are talking to to produce the materials, with the inner envelope with the postal vote certificate attached to it, in sufficient numbers if we get that, to enable us to fulfill it during that period within which postal voting is open. These suppliers—some of them obviously had worked with the federal government with the reform, which enables the postal vote certificate to be detached. I don't want to go into too much logistical detail, because that's something I really should sit down—if people have got an issue—and explain how it works. But the bottom line is the federal government changed the legislation, with no commentary as it went through the Parliament.

We are calling on the government, and also the Parliament, to consider a similar amendment here. It becomes even more challenging for registered postal voters. There are approximately 110,000 people who are registered postal voters in New South Wales. Under the current legislation I am required, once the ballot papers are produced, to send postal packs out within one business day to all of those. It is physically impossible to do that, even with this change. We just cannot get a supplier who can produce that volume. This raises a risk, which was heightened by the recent Supreme Court decision arising out of the iVote issues for the local government elections, where the court has taken a very strict view of what might constitute a material irregularity in the conduct of an election. There is a risk that a person, either in respect of an early voter not getting their pack in time, or an applicant later on applying but never getting their postal pack—that, if the numbers were close in an individual seat in the upper House, because there is an obligation to enable those people to be able to vote, the outcome of the election could be challenged and voided.

There is a solution to it. It has been run successfully at the Commonwealth elections. Basically, I'm entreating you to consider favourably that amendment. I'll be more than happy to sit down with people and talk you through that. A couple of other matters—telephone voting. The bill before the House currently has a provision for telephone voting to be provided for the blind and those with low vision. As you would expect, one of the issues which we will have to grapple with, which came up late in the piece with the federal election, is COVID-affected electors. We are currently testing the capability of our systems—I've talked about the problems of my systems in the past; I won't repeat those—as to whether we could scale up to offer telephone voting to COVID electors. I'm not in a position to say whether we could or couldn't at the moment. I've asked the government to include a provision, where a regulation could be made, or some other means could be made, so that, if it is possible to offer telephone voting to COVID-affected electors, we could do that later in the piece. So that's that.

It's interesting that, when the federal legislation went through, which gave the AEC this new approach to postal voting, they also included contingency powers to address emergency situations which arise. I'm going to raise—I haven't raised this with the government as yet, but they might like to have a look at that. You might be aware that there are very limited adjournment and other powers within the current Electoral Act. It's four hours on election day that a polling place can be closed, because of riot or fire or even health situations, and you can only adjourn a polling place for a limited period of time. Having in mind that if the Parliament gets up, as it will, later in this year, and there is some months' gap between then and the holding of the election, I think it is reasonable to at least consider whether there should be some measures in place to give a bit more scope for emergency-making

powers. COVID is the obvious issue on the horizon, but who knows, with fires and floods, et cetera, whether there might be broader challenges. But that's not a fully formed thought at the moment.

My very last comment—I raised this at the previous JSCEM hearing I attended a few weeks ago. At that time the bill hadn't been introduced. The bill proposes to shorten the voting period for pre-poll. That's a matter for the Parliament. That's a matter of policy for the government to put forward, and the Parliament will do what it wants. I just would like to have on the record that we've done some analysis of the potential impact of that. It's going to cost over $2 million extra to make the changes to enable pre-poll to be shortened to one week. We have to hire bigger and larger venues. We have to buy more equipment. We're going to have to have more staff. We will get the money. I mean, whatever it takes to run the election—I'm sure I'll be provided with the funding. In a COVID situation it would significantly reduce my flexibility to respond to handling a compressed number of people turning up for pre-poll. That's just a statement of fact. That doesn't require much thinking to see that's an obvious challenge.

There is an expectation at the moment, with local government elections, for example, which are taking place at the moment—we have taken away, for the time being, the requirement for people to have a qualification to pre-poll. There are some real logistical issues which will arise if the polling period is shortened from two weeks to one week. I'm perfectly aware that there are arguments which have been raised as to why that is a desirable thing. But it has potential impacts on the electors, and my ability to run the elections. We will have the shortest pre-poll period of any state—or the federal government—in Australia, if we reduce it from two weeks to one week. But as I keep saying, that is a matter for the Parliament. I really wanted to put those issues on the record, and again offer—if any member or party wishes to talk to me in more detail about these, particularly if amendments are brought forward, I'm more than happy to sit down and explain the implications of those.

The Hon. COURTNEY HOUSSOS: Commissioner, do you have anything to add in terms of specific terms of reference around third parties?

JOHN SCHMIDT: No. I think it is best if we just respond, as best we can, to any questions.

The Hon. PETER PRIMROSE: If I could ask, maybe to begin—and all members have these questions, so I'll just read them out to you spontaneously, if I can. Under section 35 of the Electoral Funding Act, does the commission have a role in monitoring whether third-party campaigners are acting in concert? The question is directed to whoever feels it appropriate.

RACHEL McCALLUM: Perhaps I'll answer that. It has a role in enforcing alleged contraventions of that acting in concert provision. You referred to monitoring: The Act currently does not provide for any ongoing monitoring role for the Commission.

The Hon. PETER PRIMROSE: So, then what would be the process for third-party campaigners to indicate that they were acting in concert? Is there a register or something like that?

RACHEL McCALLUM: No. There isn't a register to that effect.

The Hon. PETER PRIMROSE: Okay. Are these processes that exist sufficient to ensure that, if third-party campaigners act in concert, they don't exceed the relevant cap?

RACHEL McCALLUM: When you refer to "Are these processes … sufficient", do you mean the fact that there isn't—it depends on what the policy intention of the legislation is, whether you could enforce a breach of the provision, as I said; or, if we are reviewing according to our enforcement policy. In terms of whether there should be additional provisions that might regulate the conduct of third parties prior to their requirement to disclose to us in September what their electoral expenditure actually was, that is a policy question for the government and the Parliament.

The Hon. PETER PRIMROSE: Given that there don't seem to be concrete processes in place now, how long would you imagine it would take, and what resources would be required, to put those processes in place? I know it's a difficult one but we've heard already from the commissioner the complexity and the unforeseen consequences and the costs of putting things in place quickly. Given the complexity of this, how long do you expect, or do you believe—and maybe it's something that Mr Schmidt may wish to comment on—it would take to actually put something like this in process, if the Houses passed appropriate legislation?

RACHEL McCALLUM: My initial response would be, with reference to the 2023 election, it would be difficult to put in place a regulatory scheme that operated appropriately in the time available. The capped expenditure period begins very soon before the pre-election period for 2023, so I would have to probably take on notice what resourcing would be required to implement changes, but I'd probably also just ask for some clarification about the change. I would have to know what the change was in order to be able to cost the potential resource impacts for the Commission. But, certainly, if the Commission took a more active role in monitoring or

reviewing the activities of third-party campaigners in the lead-up to an election, that would have resource implications and probably quite significant ones for the commission.

JOHN SCHMIDT: And, if I could just add, Mr Primrose, this is emblematic of one of the challenges the Commission obviously faces. Last-minute policy changes in the lead-up to an election, particularly to make it effective; you would really have to change processes and engage additional staff at the same time as we're preparing for the state election. And, as has been pointed out, the regulated period commences in the near future. It would create significant challenges. I mean, we'll be having discussions with the government shortly about the changes which are envisaged for the lobbying regimes the government has recently announced.

One of my concerns there, depending on where they decide to place that function, and the Commissioner for that role, et cetera, every time a change of this nature is made, particularly in the run-up to a major election event, the capacity to implement it is extremely fraught and has to be adequately resourced. There comes a point, as I previously said to the Committee about similar issues, it's not just a matter of throwing money at a problem of that nature. It's time, and you just can't pass legislation, put a new function in, and expect it to be up and running for an election which is just over the horizon.

The Hon. PETER PRIMROSE: There is just one more question, if I can, and I'll finish on this, Chair. Would it be fair to say that, given the limited time if this legislation is passed—and we don't know costs and we don't even know what regulations may flow from it—it may open the Commission to legal challenges and indeed in terms of the actual running of the election?

JOHN SCHMIDT: There's always a possibility that a candidate or party could run the argument that somehow there was a material impact on the conduct of the election, if there is a regulatory regime in place which envisages that certain actions won't be taken by participants. Now, whether that would come to fruition or not, I don't know, but it's yet another ground upon which a person could challenge how we have carried out our side of the operation.

The Hon. CHRIS RATH: Some of the evidence that we've seen through the submissions has been regarding potentially a lack of clarity about what could be included or not included as part of the third-party campaigners cap, not so much that various organisations are necessarily opposed to the cap but that there is a lack of clarity about what should be included and what's not included. Is that something that concerns the Electoral Commission or something that you've picked up on?

JOHN SCHMIDT: I think our general view is—and I'm sure general counsel will correct me if I'm wrong—that's a matter for the Parliament and the government. I mean, we've seen changes proposed in the current bill, for altering some of the treatment of expenses which are covered under the Electoral Funding Act. We don't set the boundaries for what should or shouldn't be included. I don't know if Ms McCallum wants to add anything.

RACHEL McCALLUM: Perhaps the only thing that I might add is that there is a definition of electoral expenditure that third-party campaigners do need to consider when they are budgeting for any campaign activity. So, it is defined as it is defined in the Act. Sometimes it would be straightforward to make an assessment of whether electoral expenditure—or rather whether expenditure falls within the definition of "electoral expenditure" because there will be a mention of a party or a candidate in the campaign material, and in other cases an assessment would need to be made by a third-party campaigner about what the dominant purpose of that electoral expenditure was. I mean, it is open, of course. As the Commissioner has just said, definitions can be changed, but the one that is there at the moment is something in relation to the dominant purpose test, which is within the unique knowledge at the time that the campaign is being proposed by the third-party campaigner. So, whether that's a lack of clarity in the legislation, I wouldn't comment on that. I would say that it's a sort of policy question, where that assessment needs to be made, and by whom.

The Hon. CHRIS RATH: I think that's right. I think, from what I've picked up on, there are times when third-party campaigners are unsure about what should be included as part of the cap and what shouldn't when disclosing electoral expenditure. Then they have sought clarification from the Electoral Commission to then say you should check with the legislation so it's a matter then for lack of clarity in the legislation as opposed to lack of clarity coming necessarily from the Electoral Commission.

RACHEL McCALLUM: As I said, I won't say that the legislation is particularly unclear in this case, but in relation to providing guidance to third-party campaigners, or any other political participants, we do our very best to provide guidance. We don't provide legal advice about the specific circumstances of a particular political participant's activities. That would not be appropriate for us to do, and so, whilst we do our best to explain the obligations under electoral funding law to participants, we cannot give a final ruling, or even advice. We cannot consider the particular circumstances of that particular person, particularly in advance of the actual campaign, because at the time the material might be used, circumstances may have changed. It is not appropriate for us to

give legal advice. No regulator gives legal advice to the stakeholders, but we do try to give as much guidance as we can within those ethical and legal boundaries.

The Hon. CHRIS RATH: No, I completely understand that. I think some of the third-party campaigners have sought their own legal advice because of the lack of clarity about what might be included and what might not be—for instance, if they have an office that has their primary head office function but they also are campaigning in an election period, things like what percentage of the rent of their office should be used or disclosed as part of electoral expenditure can get quite tricky.

The Hon. COURTNEY HOUSSOS: Previously, the inquiry has heard that in terms of the administration for existing organisations, a bit like what Mr Rath was talking about, the administration on organisations in order to register as third-party campaigners can be quite onerous. They need to have a separate account. There are quite a lot of steps that are involved. I am certainly always interested in lowering these barriers to entry for participants. Is there anything from your perspective that you think we could be doing as we are considering this legislation to make your job easier and their job easier in terms of that actual administration? Do you see any sort of duplication or additional processes that we wouldn't necessarily need?

RACHEL McCALLUM: I am aware of the steps that third-party campaigners need to undertake, in order to be registered, and then follow, once they are registered; what their obligations are. No, I wouldn't have any suggestions to make about which of those steps might be too onerous from a regulatory perspective. I don't really have anything to volunteer. I doubt that any of us would have anything to suggest in that regard. The registration in and of itself is obviously a relatively common way in which those who are regulated are brought to the attention of the regulator. That is what is happening here, and the financial arrangements that underlie that do provide us, as the regulator, access to their transactions, if you like, related to the expenditure, so that it's all in one place. I would acknowledge that that probably creates some extra administrative burden for those third-party campaigners, but it also does serve a useful function, from the perspective of the Commission needing to assess what the expenditure was for the year or two of that, to ensure that the provisions are being complied with.

The Hon. COURTNEY HOUSSOS: Do you have something to add, Mr Bergeron?

HUGO BERGERON: Anecdotally, I think the most cumbersome requirement for third-party campaigners, just based on experience, is maintaining a campaign account, where expenditure is paid from. In some instance, there is staff salary, and things like that, and some organisations may want to run a separate payroll. We do make allowances for that, when we audit the disclosure later on, and we can provide a mechanism by which they would comply with the legislation, while not setting up a separate payroll, for example. It is by far the most mentioned requirement from third-party campaigners, or the most complained-about requirement.

Mr PAUL SCULLY: In relation to Assembly by-election—as a member of the Assembly here, I should probably ask you about the first term of reference we have. By-elections obviously vary in length—for instance, the 2016 Wollongong, Orange, and Canterbury by-elections were considerably longer than, say, the more recent Strathfield and others. Obviously, a longer period of time stretches a period over which a cap and expenditure of a cap could be incurred. In reference to the first term of reference, do you think that there should be recognition of that differing time frame in the cap arrangements? Secondly, in relation to that, the Commission itself has additional awareness-raising activities that go on during a by-election than what it would during a general election. Do you have a sense as to how much you spend on additional, say, advertising in print, online and other media for a by-election period, just to get a sense of what people could reasonably spend in that period?

RACHEL McCALLUM: Could I ask for clarification? When you say do we have an idea of the spend, do you mean our own spend and what we do to promote the election?

Mr PAUL SCULLY: Your own spend, yes. For instance, in by-elections, you take out additional newspaper advertising that is much more targeted electronic advertising.

RACHEL McCALLUM: I don't think I can offer a view here. Can I take that on notice?

Mr PAUL SCULLY: I appreciate you may not have that to hand.

RACHEL McCALLUM: We can, I think, provide that information if the Committee would like it. In relation to what the cap should be if a campaign is longer, I would see that as a policy question for government and Parliament to take into account—a policy and a legal question, of course; a constitutional question—around what the cap should be in the circumstances of the particular election event. I cannot think that there would be any operational issue for us, in terms of if the cap—if the Act provided for a sliding scale that was not just by-elections and general elections, and had some other provisions in it for other circumstances, we would enforce and regulate that, and educate and raise awareness about whatever that scheme was.

Mr PAUL SCULLY: In terms of the acting in concert arrangements, have there been circumstances where you've had to take action and what does that action look like, based on investigations or issues that have been raised?

RACHEL McCALLUM: We've never had a matter go to court in relation to this. Obviously, we are constrained by our legislation around discussing specific matters, but we do not have experience to share or look at, in terms of how the enforcement of that provision—were it to come to pass, what issues might be raised. I probably would just flag that I would expect that if there was an allegation that there was a contravention of this provision, our investigations need to be thorough. The offence contains, as you would expect, a number of elements that us, as prosecutor, would need to be able to be satisfied about, before taking any court action, with the consent of the Commission. I would imagine that any investigation process would necessarily be a fairly long period of time, given the need to prove or be satisfied that we have evidence to support all of the different elements of the offence.

The Hon. PETER PRIMROSE: Could that action include seeking an injunction to prevent a group that you believe to be acting in concert from actually campaigning?

RACHEL McCALLUM: The Commission can seek injunctions to prevent breaches of the law, but I would again refer to my previous answer in relation to the evidence required. Although not all the evidence would be required at a point of injunction, there are obviously some very significant challenges during, say, an election period, for the Commission to be satisfied that the evidence existed to warrant such a significant step.

The Hon. PETER PRIMROSE: Just considering the fact that we're talking about an election next March, if this legislation passes the House, you would be obliged to enact it and take action.

RACHEL McCALLUM: Which legislation are you talking about passing the House, sorry? I'm not quite sure what you mean by that.

JOHN SCHMIDT: I am sorry, Mr Primrose. Are you saying that out of this hearing you understand a bill will come forward, which will perhaps expand or alter the current provisions regarding acting in concert?

The Hon. PETER PRIMROSE: No, I am talking about the fact that if you have caps then—

RACHEL McCALLUM: I see. Sorry.

The Hon. PETER PRIMROSE: —one plus one equals two. That bill is before the House.

RACHEL McCALLUM: In restoring the position to that which was before the Unions NSW challenge, yes, there will be a cap if the legislation passes. But the evidence that would be required to take action in relation to that, prior to the March state election, would be very difficult to gather in that time.

The Hon. PETER PRIMROSE: One final thing, then. It may be, then, that if you didn't take action, action could be taken subsequently to the electoral result—

RACHEL McCALLUM: Yes, of course.

The Hon. PETER PRIMROSE: —in fact overturning that election result.

RACHEL McCALLUM: Well, it wouldn't of itself overturn the election result; that would be a matter for the Court of Disputed Returns. If down the track there was a conviction, that wouldn't of itself overturn an election result.

The Hon. PETER PRIMROSE: Thank you. We live in interesting times.

The Hon. COURTNEY HOUSSOS: In terms of the advice that you provide to potential third-party campaigners, are you able to take it on notice and provide us with any advice or guidance that you provide? Or is it true that they have to seek their own independent legal advice?

RACHEL McCALLUM: I can take it on notice and provide you with copies of the generic guidance that we have available for third-party campaigners. That is available. I guess I could take that on notice.

The Hon. COURTNEY HOUSSOS: That's fine. We can see that online. I'm interested whether there is any additional information that you provide to third-party campaigners, or do you tell them that they have to seek their own legal advice?

RACHEL McCALLUM: If they ask for legal advice from us, we will tell them we cannot give it and they will need to seek their own legal advice.

The Hon. COURTNEY HOUSSOS: I don't think they're asking for legal advice. I think they're asking for clarification around how they should be conducting their affairs in order to conform with the legislation. Is it true that the Electoral Commission tells them to seek legal advice on that?

RACHEL McCALLUM: We will tell them to seek legal advice if what they're asking for is legal advice. The distinction is—

JOHN SCHMIDT: It's a difficult question to answer, because we have the guidance on the website, and we provide other information to people. It's at what point is there a simple misunderstanding or perhaps a clarification of what that advice is - because that would an ad hoc thing, we wouldn't be able to produce something which is a standing document, because that's what would be on the website. We try and make the information on the website as clear as possible. But I think what Rachel is alluding to is that there comes a point with the Electoral Funding Act 2018 in general—by the very nature of it, it is a complex bit of legislation. It's not a difficult point to get to where you really are getting into questions of legal interpretation, and we have to be very, very careful about what we say at that point.

The Hon. COURTNEY HOUSSOS: I appreciate that, but obviously there are established political parties which have, over time, developed their own practices and procedures and we would expect that they would need to get legal advice from time to time. The concern with this—and obviously we're considering third-party caps—is that certainly I believe we should be encouraging more people to get involved in the political process. We want to keep those barriers to getting involved quite low. Often if we're asking community-based organisations or smaller organisations to engage in the political process yet requiring them to register, they're going to need a little bit more help. Telling them to seek independent legal advice is perhaps not realistic. Being able to provide that additional support to organisations that are registering as third-party campaigners—irrespective of their size, I should say—is I think a really important role for the commission. That's what I'm trying to get clarity around.

HUGO BERGERON: It depends on what guidance is sought from us. Often we have those smaller organisations that want to participate in the election in one way or another, and they are unfamiliar with the campaign account provision, how to comply with those, or how to set up their account. That's information we readily provide. In other times it's more focused, saying, "I want to broadcast that TV advertisement. Is it electoral expenditure?" That's when it becomes more of a legal advice-type question, which we can't answer without understanding all the circumstances in which that expenditure will be incurred.

JOHN SCHMIDT: What might be useful in this space is that, under the Electoral Act 2017, when questions are raised during an election period—quite often with smaller parties or standalone candidates, of course, who have less experience in the space—we have a general rule that, if people ask us questions and we're going to give a response of clarification where we don't believe it's legal advice, we publish it in one of our bulletins to everybody. Everybody hears the same thing at the same time. We do try and include third-party campaigners in our bulletins, but we can certainly consider people who have registered, in particular, because we know who they are, and we have contact details. That could be a practice which maybe there's room for expansion on.

The Hon. COURTNEY HOUSSOS: I think that would be a great step. Like I say, I understand that the scope of third-party campaigners is very different. You have really big organisations that are trying to manage the way that they usually operate and to conform with the Electoral Act and the requirements but then there are also smaller-based organisations. I just think an understanding from the Electoral Commission that third-party campaigners, irrespective of their size, are different to political parties, particularly with their capacities. I think there should just be an increased scope for advice for those third-party campaigners. I think that's really important.

JOHN SCHMIDT: Okay.

The CHAIR: Time has run out for this particular section. Thank you very much for appearing before us today. We may send you some further questions in writing. Your replies will form a part of the evidence that is made public. Would you be happy to provide any written replies to any further questions?

JOHN SCHMIDT: Certainly.

The CHAIR: Thank you so much for taking the time to appear today and visit Parliament.

(The witnesses withdrew.)

Mr MARK MOREY, Secretary, Unions NSW, affirmed and examined

Mr THOMAS COSTA, Assistant Secretary, Unions NSW, affirmed and examined

Mr BRETT HOLMES, General Secretary, NSW Nurses and Midwives' Association, affirmed and examined

Ms LUCY WALKER, Manager, Business Services and Compliance, NSW Nurses and Midwives' Association, affirmed and examined

The CHAIR: Thank you very much for joining us today under the circumstances. Before we start, do you have any questions about the hearing process?

MARK MOREY: No, Chair.

The CHAIR: Would any of you like to make a short opening statement before the beginning of questions?

MARK MOREY: I will make one on behalf of Unions NSW. Thank you for the opportunity to appear before the inquiry today. Members of this Committee may also be aware that Unions NSW and three unions have filed an application in the High Court challenging the constitutional validity of the two laws subject to this inquiry. Unions NSW and our affiliates are active third-party campaigners in elections and by-elections. We have a long history of coordinating campaigns with our affiliates on industrial, social, and political issues. Joint campaigning among unions is business-as-usual work.

Elections are important periods when political parties can be held most accountable for their policies and actions. It is a critical opportunity for the voices of union members and working people to be heard in the political debate. Unlike large corporations, working people do not often sit on government committees and panels. Working people do not have the opportunity to engage directly with the government, or directly affect policy decisions. The main way in which working people communicate their concerns is by pooling their economic resources to enable them to participate in the political and electoral process. Union membership is the main way to pool these resources, and to allow the voices of working people to be heard.

Unions NSW advocates for an electoral system that upholds the freedom of political expression. It is crucial that unions and other third-party campaigners—such as churches, charities, community groups, and environmental groups—are provided with a reasonable opportunity to participate in the electoral process, and to voice their concerns to decision-makers in the lead-up to elections. Unions NSW does not believe that the two laws that are subject to this inquiry uphold the freedom of political expression.

The current state by-election cap does not allow for the meaningful participation of unions and other third-party campaigners. An amount of $21,600 means that unions can spend only one-twelfth of what candidates spend in by-elections. The acting in concert provision in section 35 is a direct attack on the freedom of political communication of unions. By criminalising joint campaigning, it has a cooling effect on political debate, and silences the participation of unions and civil society organisations.

Unions NSW makes these recommendations to the Committee: that the third-party campaigner expenditure cap in New South Wales State by-elections of $21,600 is not reasonably adequate; that the applicable cap should be same as the candidate cap, being $265,000; and that the acting in concert provision in section 35 should be repealed. Before I finish, Chair, I would like to endorse—I will probably never do this again in my life—NSW Mining's comment in their conclusion, that the previous caps on third-party campaigners' electoral expenditure in section 29 (11) and section 35 of the *Electoral Funding Act 2018* have been poorly framed. They are opaque and confusing, and fail to meet their objectives of ensuring electoral expenditure is disclosed accurately. They are a public policy failure and should be recognised as such.

The Hon. ROBERT BORSAK: You looking for a position on the council, are you?

MARK MOREY: I'm always happy to help.

The CHAIR: Any further opening statements?

BRETT HOLMES: On behalf of the NSW Nurses and Midwives' Association, we certainly endorse the position taken by Unions NSW. The crux of this matter is that the New South Wales government is the employer of our members. In 2011, the New South Wales government chose to remove the powers of the New South Wales Industrial Relations Commission to determine the outcomes of wages and conditions for our members. In imposing those laws, the government reaffirmed the absolute need for our union to be able to publicly campaign and, unfortunately, to have to engage in political campaigns, because the decisions made about the lives and the working experiences of our members are made by politicians. Politicians have taken it on themselves to

be the arbiters of how our members work, what conditions they experience, and the pay that they have. In order to be able to properly influence the experiences of our members, to gain better outcomes for our members, and a better health system, a better disability system, we need to be able to campaign.

The electoral funding caps for by-elections, first of all, is an example of where it kills the capacity to campaign. In many circumstances—when I look at a cap of $20,000, when I have significant numbers of staff who might be out in the field talking to members—I have to be very careful about what they're saying, for fear that it's captured as talking to influence a vote. Because ultimately politicians have decided that they're in control, the only way we can influence the real outcomes for our members is their vote. Twenty thousand dollars can be spent very quickly by a large organisation. It's totally inadequate to run a proper campaign, even in a small electorate with a small number of people, but manifestly inadequate if you wish to have a voice in a by-election run in metropolitan areas. We have set out what we would think would be necessary to run a proper campaign.

In many instances the Nurses and Midwives' Association have registered to be a third-party campaigner in by-elections but have done nothing. In fact, we've done everything we can to avoid being captured, because of the risks placed upon us by the laws. These are laws that are manifestly preventing the voices of many people within that community—the nurses and midwives—from having their collective voices heard. The acting in concert is, as we've pointed out, aimed at preventing normal interaction between unions. It's a direct attack on the collective behaviour of unions. For that purpose, that puts us in the position that we face potentially criminal sanctions if we talk about the fact that we would like to have our politicians represent the views or the interests of our members. So, a discussion in the capped period between myself, as the largest affiliate of Unions NSW, paying the most money to Unions NSW, as a result of our membership size, could land me in a situation where I can then no longer advocate for my members because I'm in breach or potential breach of the caps.

Acting in concert is, I think, clearly identified. We do refer to the 2018 High Court case, where even what we would've thought was a conservative justice made the only real comment there in that court clearly identifying that it should be invalid, because it impermissibly burdens the implied freedom of communication on government and political matters, contrary to the Commonwealth Constitution. Whilst the whole court decided not to make a finding on that, the fact is that Justice Edelman, who I would have thought would have taken a conservative approach, was very clear. Yet the New South Wales government has not heard the message there and, unfortunately, we again need to go back to the High Court, should the government persist with its legislation. It's an abomination that, as an affiliate of Unions NSW, once that cap period is in place I can't even influence Unions NSW to say, "Don't do it", because if I'm caught having this discussion about influencing votes via sharing information about our campaigns, then I'm personally at risk, as is Mark, and our union body is at risk. This is a very pointed piece of legislation. It affects very few others except unions. It needs to be repealed.

The Hon. CHRIS RATH: I'll probably ask this to most of the witnesses. I asked the Electoral Commission before. I want to ask your opinion on whether there's a lack of clarity under the existing rules about what's included in electoral expenditure or what's not included. We've seen some of the evidence, including I think from the NSW Mining submission, that there's a complete lack of clarity at times, which has basically meant they need to seek legal advice about what would be included and not included. Is that the same experience for Unions NSW as well?

MARK MOREY: Very much so. Even this week we had a meeting where most of the hour was taken up with "How do we manage what we're doing? How do we separate our business-as-usual activity from what's perceived as electoral activity?" At times there's a very thin line, because at times during the year we may be saying that the government is obviously not doing its job, and they should go. Outside of that electoral period, you can just go for your life. Once you get into the electoral period, and you start saying, "You should be voting against the government", then you're going to find that really weird period where you're actually advocating for—it's electoral communication, and then your business as usual, potentially, could become caught up in electoral expenditure, rather than just being seen as business as usual.

The other thing I would say is that we have spent a lot of time trying to think through "Are we complying with the legislation?" And also, you do seek advice from the Electoral Commission. They tell us to go and get our own independent legal advice, which is fine, but it just seems ridiculous if you're going to say, "If I do this, will I breach it?" You get legal advice that says that you won't, and then they come back and say that you've breached it. Your argument is "But you told us to go and get it." That doesn't suffice. I think one of the issues, certainly with this, is that even with legal advice, you're not in a position to defend yourself.

The Hon. CHRIS RATH: Yes. I hear all that. I think, putting aside a lot of the other evidence that we've heard today from you and in your submissions, that there could be a real opportunity for potential bipartisan reform to maybe clarify some of those issues, putting aside the other more controversial and partisan part of what

we're talking about, but to actually clarify what should be included and what shouldn't be included as a potential amendment to overcome some of these issues. Is that something that you would support?

MARK MOREY: Well, I think if you look at the history of the Act, it's been cobbled together over different iterations. It's been different at different times, with things added, put in. There is a real question: Is the Act fit for purpose in a modern—you know, where we sit today time-wise? There are a whole lot of things around online voting and all those sorts of things that I'm not supportive of, but does the Act contemplate how we actually make voting more accessible—the processes around that? I think the whole Act needs a good review.

THOMAS COSTA: I could probably add an example to highlight what Mr Morey is saying. Part of our business-as-usual work in Unions NSW is to coordinate negotiations in enterprise bargaining. Particularly at the moment, we're involved in the Sydney Trains and NSW Trains negotiations with the New South Wales government. Part of that negotiation, as with any negotiation, is criticisms from both sides of the table about how bargaining is going, and it is inevitably political, in that sense. Should that bargaining negotiation continue into the election period, we are concerned that activities we do involved in bargaining could be misconstrued as actual election campaigning activity, and that would include communicating with our affiliates, which is six unions, and communicating with their members. So, we would be caught up by electoral expenditure under this Act. We would be caught up by acting in concert, by the prohibition on third parties acting in concert under this Act as well. All of that would be us just performing our business-as-usual work that just happens to track into a period of time which is now called the capped period.

There's no clarity under the legislation about how we distinguish that. It does appear that anything that is politically against a government, or a political party running in the election, would be captured by the electoral expenditure definition, and that would include if we were to come out and criticise government for their behaviour during bargaining, or to criticise a position they were putting forward during bargaining, or any of the normal day-to-day things you would expect happening in negotiations. So it doesn't just put a chilling effect on our ability to campaign. It doesn't just put a chilling effect on our ability to communicate with our affiliates and our members. It does both those things, but not just that; it also puts a chilling effect on our ability to do what is our business as usual, which is to negotiate and bargain on behalf of our affiliates and members with the New South Wales government during a capped period.

Mr KEVIN CONOLLY: Mr Morey, if I can clarify this: I think you said you believe the cap for third-party campaigners should be the same as for candidates?

MARK MOREY: Yes, in by-elections.

Mr KEVIN CONOLLY: You also said that those third parties that should be able to act in concert. There shouldn't be any prohibition on that.

MARK MOREY: Correct.

Mr KEVIN CONOLLY: That could mean that third-party campaigners could spend four or five times as much as a candidate could in a by-election contest when there were four or five third-party campaigners acting in concert.

MARK MOREY: But—

Mr KEVIN CONOLLY: Is that a fair and reasonable proposition?

MARK MOREY: It's a fair and reasonable proposition, but I don't think it's correct. If you look at the expenditure of third-party campaigners and unions, the majority of us never hit the caps, and we would never spend necessarily up to that point every time. What we're saying is that—my position is, democracy is a funny old thing. You need checks and balances. You need different voices at all times, and what this legislation does is it prevents a large section of the community who don't have the opportunity, say, as the Minerals Council, to sit in the room with a Prime Minister and talk, but for workers to be able to pool their money, their resources, and have a go at getting their message out there, at the one time in the electoral cycle when they can be heard.

Mr KEVIN CONOLLY: Is your position really, in a sense, opposition to expenditure caps altogether, and there might be better ways of regulating finances during campaign periods to achieve the objectives you want rather than put artificial constraints on people campaigning?

MARK MOREY: I'm not a proponent of trying to cap people and silence democracy—I think there has to be a balance—but the current laws don't provide that balance. For us, as a peak body, section 35 means that we're incapable of doing our work and representing not only large unions but, as a peak, the small unions that have a small membership—for example, ASMOF, the doctors' union—being able to magnify their voice in an

election campaign, when they are only a small union. So, section 35 curtails our ability not only just to speak out, but also to assist smaller groups have their issues heard as well.

The Hon. PETER PRIMROSE: Given that there is section 35 and given the elections next March and we're about to be come into the regulated period in a couple of months, how do you notify or register with the Electoral Commission whom you are acting in concert with? What provisions has the Electoral Commission, the Governor, specified as to how you determine that you're acting in concert?

MARK MOREY: Well, we've taken a very conservative view. We have taken the view that we won't communicate with our affiliates during an election period, because we don't want to risk uncertainty about how you actually do that. We, in fact—some time ago, we were getting advice from our lawyers, and we were briefing our executive, which is our management committee, and we had a presentation. We were going to give people an update on our approach to the last state election. After the briefing from the lawyers, we turned to them and said, "Should we be giving this presentation?", to which they said, "No, you should not." So, even at our executive, the body that manages us, we did not talk about electoral matters or electoral campaigning in that forum. So we've taken a very conservative approach, so that we don't end up ensnaring our affiliates with us during the election period.

The Hon. PETER PRIMROSE: Mr Holmes, do you have any comments?

BRETT HOLMES: Well, that's a major problem, in that the legislation obviously hasn't been tested yet, so we don't know exactly how a court would interpret it. I'm also an advocate for conservatism because from the Nurses and Midwives' Association's point of view, I do not want to have anyone else's constraints placed upon our union's ability to voice the concerns of our members. That means that I don't participate, once that capped period is on, in discussions about elections with other affiliates, or Unions NSW. So, we run our own race. Frankly, that's not really desirable, in that there could be great benefit to the wider union movement of working collectively to decide what the highest priority is. So it just adds to the point from the Nurses and Midwives' Association that our only priority is our issues. That might be kind, but not good.

The Hon. PETER PRIMROSE: I have two follow-up questions arising out of that, then. Firstly, are there any guidelines from the Electoral Commission—any subordinate legislation, anything at all—that could give you guidelines on this?

MARK MOREY: No. The election before, they came in and did a presentation for us, on PowerPoint. The last election, we invited them to come and give a presentation. They said they couldn't, and they wouldn't. There are no guidelines. As I said before, when you do seek advice, they tell you to go and get your own independent legal advice, which is not what you want to get from the regulator. When you are genuinely trying to seek to comply with the legislation, they should be in a position to at least assist you with the pros and cons of doing what you're about to do. I know they're in a position where they say, "We can't give you legal advice," but they could at least give you some guidance as to what you're actually doing or where what you're proposing falls into the legislation, and they don't do that.

The Hon. PETER PRIMROSE: My other question arising here is to all the witnesses. You talk about your affiliates but, presumably, it would be possible under this provision to be acting in concert with non-affiliates. I cite this, given your unique interest, from the Minerals Council, who you mentioned. Given the nature of some affiliates, you would have policies on the ground. You would be campaigning electorally with another organisation such as the Minerals Council or presumably in the health field—there would be someone supporting ratios or whatever. You could then be acting in concert with those and then, accordingly, the caps would come in. It would be possible—and this was raised during an earlier inquiry of this Committee—for you to not be able to spend any funding at all because that other agency that you're acting in concert with, that other third-party body, would spend up to the cap. I am just wondering how you would respond to that.

BRETT HOLMES: I recall that during the last election I was approached by a women's group who wished to have our support for their campaigning around women's rights and family violence. Not knowing whether that group would be captured as a third-party campaigner meant that what would normally be a conversation with them about shared interests was, I'm afraid, one of, "We really can't talk to you without the risk of either affecting you or us, in terms of any campaign that we run or you run in the election. If we agree to campaign on an issue, or if we have a discussion about that campaigning, then you're captured." That's how we see the legislation because it is so restrictive and carries high penalties. I don't want to put what is essentially a volunteer group at risk because we've somehow coalesced and agreed that a particular policy was in the best interests of our members—more than 80 per cent women—suffering domestic violence, and the failure of rights, over the top of the strategic aims of the union around workplace issues. It's a really chilling effect on what would be normally, outside of that capped period, a very good opportunity to work for the improvement of society.

MARK MOREY: I know that we've spoken to a number of community-based organisations and they have no idea that this legislation even exists. We've spent time educating people, saying, "We can't talk to you about that," and they say, "Why not?" and we take them through the Electoral Act. It's "inside the bubble" – people dealing with elections and by-elections constantly – who are very aware of it, but people outside that have little or no knowledge of it, because they just don't participate in that sort of regulation with their organisations.

Mr PAUL SCULLY: Following up from that comment, would you expect then a lot of those community groups have just gone, "This is all too hard," and not bothered to engage in that process and raise the issues, whether it be a lift at a particular train station that they might be advocating for or changes to things at the end of their street?

MARK MOREY: Absolutely. I think the other burden upon those organisations is the regulatory burden of complying—keeping records, making sure you have receipts, submitting them to the Electoral Commission. That costs a lot of money, to actually have an internal system that is big enough to manage that, monitor that, and put those returns in. Even when you are doing that, mistakes are still made. That has a further, not just a cooling effect, but a financial impact on organisations who then participate in an election, because they've got to have a system in place that is foolproof for your spending. So, yes, they just don't participate. It's all too hard. In fact, a number of our affiliates in the last state election just said, "It's all too hard. We're not even going to register or bother."

The Hon. COURTNEY HOUSSOS: The acting in concert provisions are a relatively new addition to the Electoral Act in New South Wales. My understanding is they're only seen in the ACT jurisdiction, which has a very different election campaign. In the ACT, they apply to candidates and to other people. The acting in concert provisions only apply to third-party campaigners, don't they?

MARK MOREY: Yes.

The Hon. COURTNEY HOUSSOS: When we are talking about the restrictions that are placed on third-party campaigners—and we've had a long discussion—there is quite a large amount of agreement about the burdens that we're putting on them. The acting in concert provisions are only on third-party campaigners.

MARK MOREY: That's correct.

The Hon. COURTNEY HOUSSOS: And they're a new addition, compared with your long history of advocacy with Unions NSW.

MARK MOREY: Yes, they're only a recent—in fact, it felt like to us, when it was actually passed, that someone sat down and worked out, "How do we stop unions from campaigning in a state election?" and they came up with section 35.

The Hon. COURTNEY HOUSSOS: Political parties can work together—

MARK MOREY: Yes.

The Hon. COURTNEY HOUSSOS: —but third-party campaigners can't?

MARK MOREY: No. That's correct.

The Hon. COURTNEY HOUSSOS: Which seems like a pretty outrageous situation to me.

MARK MOREY: Well, we've won two High Court cases.

Mr PAUL SCULLY: It's not just you, Courtney.

The Hon. COURTNEY HOUSSOS: Yes, I would certainly acknowledge that, and the fact that the High Court seems to be on the right side of this. Mr Holmes, in your opening statement you spoke about the other question that I wanted to ask about. The High Court didn't explicitly deal with the acting in concert provisions, but we do have some useful kind of indicators of where they are going. Do you just want to provide us with some guidance on that? That would be useful. As Mr Morey said, it has been fought out in the High Court and we got to a position, but there was actually some discussion about the acting in concert provisions, wasn't there?

BRETT HOLMES: That's right. There was considerable discussion and consideration by the High Court. Justice Edelman was the only justice that made comment in a separate decision, and he found that it was unconstitutional, essentially. The rest of the court decided that they did not need to make a judgement on acting in concert, because they had removed the caps. The caps link to the acting in concert. You place a cap on and then acting in concert matters, for the purposes of the cap. It's the fear of capturing everyone under the one single cap, so that our voice gets consolidated into only one message. That is where the problem is.

We have different issues at elections to other unions. We have been campaigning for nurse-to-patient ratios, even in the term of the last Labor government. I might note that we even went on strike against the last Labor government, and we disrupted their election campaign. When conservative forces say that we are one-sided, I can assure you we are not. We will go to any government when we've got an issue that is about safe patient care.

It's unfortunate. I truly regret the fact that we have to spend our members' money politically campaigning, but that was the choice of politicians. They sat around the table and said, "Let's decide how we can take away the industrial rights of workers in the public sector"—and they did it. That leaves us no choice. The acting in concert needs to go. It is unconstitutional, and I hope that, if we get to the High Court again, that the whole of the court makes a decision, not just one of the justices. There's got to be the opportunity for voices to be heard around important issues. We believe safe patient care in New South Wales is an important issue that the public should know about. We shouldn't be restricted from October to March from campaigning about it. It's a bit of a bizarre determination that's been made by Parliament that tries to prevent the voices of 75,000 nurses from being heard.

The Hon. CHRIS RATH: I've got a clarification. I don't want to get into a political argument. I don't necessarily agree, but I hear what you're saying about the caps and the in concert provisions. I know you're probably opposed to the caps entirely. But wouldn't you say that if you have caps, you have to have the in concert provision? Otherwise the incentive is to create, hypothetically, multiple smaller organisations that could basically get around the cap through working together, and they are all able to spend up to the cap. As a completely hypothetical example, a business chamber could then create a "business council", a "Willoughby business chamber" and an "Eastern Suburbs business chamber". They could essentially all get around the cap by all spending up to the maximum, thereby the cap is basically useless. You've just created a whole network of different associated entities. By all means, you might oppose the cap entirely, but there is not really any other way of enforcing the cap, in real terms, unless you have the in concert provisions as well.

MARK MOREY: That would be the model that the Liberal Party and the National Party have and operate currently, where they both can spend up to the caps. They're not seen as acting in concert, yet they can pool their resources and have a coordinated city-country campaign across the whole of New South Wales. That's unfair.

The Hon. CHRIS RATH: Yes, but it's not like there are multiple different Liberal and National parties—

Mr PAUL SCULLY: No, just a coalition agreement.

The Hon. CHRIS RATH: Well, there's actually Country Labor as well that operates in the same—

MARK MOREY: Country Labor doesn't exist anymore.

The Hon. CHRIS RATH: Well when it did, it operated in the same—

MARK MOREY: And it was based on the model that had been set up of having two parties to do it.

The Hon. CHRIS RATH: But just putting the politics to one side, what I'm saying is technically you can get around the cap by having multiple organisations working together and spending up to the cap unless—

THOMAS COSTA: I don't think that's right.

The Hon. CHRIS RATH: —you have the in concert provision in place.

THOMAS COSTA: That's not right. As Ms Houssos pointed out earlier, political candidates are not constrained by the acting in concert provisions, but there are provisions under the Act that apply to political candidates, to prevent them circumventing the caps. What we've argued in our submission is that those provisions should apply equally to third-party candidates and candidates, and that there is no need for this particular provision in section 35 that only applies to third-party candidates. The sections under section 143 and section 144 have provisions that prevent candidates from creating schemes in which they would circumvent their own cap. That could apply to the situation that you've described, if a third-party campaigner was manipulating the system in order to boost their own cap. That would be what we say is the better way to do it, because it would be looking towards the actual intention of the conduct, as opposed to what we have here, a blunt instrument to prevent third-party campaigners from even talking to each other about electoral matters.

This is also a solution looking for a problem, because we do not have a situation in this state at the moment—and we never have—where a group has set up multiple subsidiary bodies in order to create a way around these caps. It just hasn't happened. It probably won't happen, because of the complexity and expense involved in it. Even if it was to happen, we'd argue that the Act already has provisions that prevent that from continuing. They are the same provisions that apply to candidates. To use your example and take it to the extreme, a political party could do exactly the same thing. They could run 15 candidates in the same seat and then only promote one

candidate using the money of all of the others. It doesn't happen, but it could happen, as a hypothetical. The Act has provisions to deal with those situations, when the intention is purely there to circumvent the cap, as opposed to a legitimate organisation for a legitimate candidate acting in concert with another.

The Hon. CHRIS RATH: Thank you. That's very helpful, actually.

The Hon. COURTNEY HOUSSOS: In fact, what we're seeing is the opposite of that. Mr Morey, you were saying that there are affiliated unions that participate in the political process, and have in the past, but find the barriers to entry are so high. Rather than the situation that Mr Rath outlined, the difficulty in actually establishing yourself under the legislation is so high that it's just not going to happen.

MARK MOREY: No.

Mr PAUL SCULLY: Similarly, as Mr Holmes outlined before, he takes a particularly conservative approach. If someone else were to move, say, on a regional hospital issue, which is always particularly important—and there are multiple unions in a hospital—if someone started campaigning on a hospital upgrade you would almost be forced to back out so as to not risk breaching the acting in concert provisions, potentially.

BRETT HOLMES: We'd have to run separately. If it's in a by-election situation, then $20,000 goes nowhere if you're trying to communicate with 60,000 people. You can't even send them a letter. You can't even afford, really, to letterbox the whole electorate. From that perspective, the cap in by-elections is clearly inadequate. In our submission we acknowledge there is a cap. We have a slightly more conservative view than Unions NSW. At least give us 75 per cent of the cap to have a voice, should we decide to exercise it. We don't always exercise it. It has to be relevant to the benefit of our members. That's how we operate our union: There has got to be benefit to our members. There's got to be an issue that is able to be campaigned around.

In relation to Mr Rath's comments, the reality is that deciding to spend either members' money or corporations' money on elections is a serious one. I don't see anyone in New South Wales that I'm aware of—I don't know what goes on behind the scenes in the top echelons of corporations—going out and spending multiple millions of dollars. We want to be able to spend enough money on an election. I don't believe the current caps are adequate, given how much it costs to run an election campaign. As soon as you get into election period, the price of TV skyrockets. You cannot run a Sydney ad that has any reach for under $600,000. Then, if you really want to actually reach people, and go to all of New South Wales, just your TV costs alone around that start at $1 million. The cap that you're considering today, the $20,000, is just, frankly, a joke. That's why we often don't campaign in by-elections. We might see if our members have a particular issue, and put out a bit, but it's not an effective campaign. We know that that $20,000 does not have enough reach in a campaign to make any real impact.

The Hon. ROBERT BORSAK: Mr Morey or Mr Costa, listening to your evidence today—and I think obviously there's a legitimate complaint in relation to how this is all done and obviously the High Court is supporting that. But how, from a practical point of view, do you come up with a way of legislating that this process of combining campaigns, for example, isn't abused rather than just saying, "Well, trust us, we won't do the wrong thing"? That's what I'm hearing. Is there a way that you could see, putting aside the problems also with when that process of counting the cap money starts too—and you're also saying there, "Well, we're doing internal processes to try to make sure that we don't fall foul of that or our understanding of that." Do you have a practical solution in mind that you could put forward on how that would work? Otherwise it makes it difficult for legislators to come up with a pattern, if you like, or a platform or legislation that's going to allow you to actually voice legitimate voices of your members.

MARK MOREY: I remember—I think in the first High Court case, the judges asked the government, "What ill are you trying to cure?" And they couldn't give an example. They said corruption. They said all these different things. They were unable to demonstrate that in their evidence. Now, if you're trying to set legislation that has a cap that's equally applied to all third-party campaigners and campaigners, we think – from our work with the cases and that – if that's equitably done, then you can have a cap on third-party campaigners. As Mr Costa said, there's legislation there that would stop you rorting that part of the system. But the ill that section 35 is trying to stop is not clear. It seems to be trying to stop third-party campaigners working together during an election period, not just on getting spending up to the caps, but anything you do. Your wages are counted—the petrol you use, the cars you use. If we donate furniture to a candidate, that's got to be included in it. I'm not sure what the ill is in that stuff you're actually trying to cure. If you're trying to stop electoral fraud and electoral corruption, then there are better ways to do it than an acting in concert provision and, arguably, those provisions already exist in the Act.

THOMAS COSTA: I think it's really important that we keep in mind the fundamental right of people to politically campaign, and that that right goes beyond political parties and candidates, but actually to individuals in our communities, and their organisations. All of us here represent member-based organisations, and they

determine what we do, ultimately. They deserve a right to participate in the political process, and they deserve that right as much as possible, unfettered by restraint. If you are going to introduce restraint, like Mr Morey said, you need a really clear reason why. The previous Electoral Funding Act had anti-avoidance provisions in it, to prevent caps being avoided. Those provisions continue in the current Act. They apply to all parties, but the third-party acting in concert provisions only apply to third parties, and not to political parties and political candidates.

If there was a problem with individuals or organisations avoiding caps, we would know about it, because we have to disclose every piece of expenditure that we do in an electoral campaign. We would know if this was a problem. We would've known if it was a problem under the previous Act as well. There is no evidence that it has been a problem. There's no evidence that the caps have been abused. In light of the fact that there already are anti-avoidance provisions that apply to candidates in the previous Act, and that continue in this Act, it is our position that those anti-avoidance provisions should be the same for political parties, candidates, and third-party campaigners, and that should be enough. Because what we're talking about here is restraining a fundamental constitutional right of Australian citizens, which is the right to participate in political communication. We should not fetter that right lightly. We definitely shouldn't fetter it if we have no evidence that it's being misused, and there's definitely no reason for a blunt instrument that prevents third-party campaigners from communicating even at the moderate level.

As Mr Holmes said in his opening statement, he is our largest affiliate—the largest affiliate of Unions NSW. If Unions NSW runs an election campaign in this state election, Mr Holmes, as our largest affiliate, would be prohibited by these current provisions from having oversight over that campaign if he wishes to run his own campaign. That means we cannot communicate even with our own affiliates, our own management committee, about what activities we're conducting, because these provisions go to the extreme of not allowing us to talk to each other, if those other parties who are affiliated to us want to campaign as well. So it does create a chilling effect in a sense, because some of those parties will just say, "Well, we want to have oversight of the Unions NSW campaign, so we won't run our own individual campaign."

The Hon. ROBERT BORSAK: So what's the solution? Again, I get back to the original question. You're outlining the problem but is there a solution, practical or impractical, that you can see?

THOMAS COSTA: The solution that we're proposing is the provisions in sections 143 and 144, which are the anti-avoidance provisions that apply to candidates. We think they go far enough. They are working, in terms of preventing political parties and candidates from avoiding their caps. We think they go far enough to prevent third parties from avoiding their caps or misusing the caps, as a provision. There is no evidence that when they applied in the previous Act, prior to this new cap on third parties, that they weren't working effectively. We think they are enough to prevent the conduct that's been described as a risk here.

The CHAIR: Time has expired for questions. Thank you very much for appearing before us today. We may send you some further questions in writing. Your replies will form part of the evidence made public. Would you be happy to provide a written reply to any further questions?

MARK MOREY: Yes, Chair.

The CHAIR: Thank you so much for joining us today.

(The witnesses withdrew.)

(Luncheon adjournment)

STEPHEN GALILEE, CEO, NSW Minerals Council Ltd, before the Committee via videoconference, affirmed and examined

CHRISTINA LANGBY, Company Secretary, NSW Minerals Council Ltd, before the Committee via videoconference, affirmed and examined

The CHAIR: Would you like to make a short opening statement before we begin the questions?

STEPHEN GALILEE: Yes, I would, thank you. Thank you for the opportunity to appear before the Committee. As you have hopefully seen from our relatively short and sharp submission to the Committee, our issues relating to the Committee's deliberations are essentially twofold, in relation to the proposed caps as we have dealt with. Firstly, the NSW Minerals Council, for those of you that aren't familiar with what we do, operates across a wide range of activities. One of the things we do on a regular basis is conduct advertising and public information campaigns, either in response to specific events, such as the COVID pandemic, where we were involved in encouraging mining workers and mining communities to get vaccinated, or, more broadly, promoting the industry's activities—what we do and how we do it—which is important to the industry for jobs, and even promoting the industry as an opportunity for careers for young people, and those sorts of things. We do that on a regular basis amongst other activities.

We registered as a third-party campaigner when these reforms were introduced before the 2016 election, and again in 2019. As you would appreciate, we are under a lot of scrutiny as an industry and as an organisation from certain sections, and we at all times have endeavoured to meet our obligations, and comply with the rules as best we can. But what we have found in our experience are two particular issues, amongst other smaller issues, which I'm happy to speak about as well. Firstly, the difficulty in complying with the rules as they have previously been applied and implemented has created a situation for us where we've essentially had to report activities that we would otherwise have undertaken—even if an election was not on during that six-month period—as campaign activities, based on the advice that we received from our lawyers and from others, that that was what we would be required to do in order to not be, potentially, in breach of our obligations.

What in effect happened, especially before the last election, was campaign activity that we were undertaking to promote jobs in the mining industry was captured under these arrangements. What that meant was not only did it limit the amount that we could have potentially spent if we wanted to get involved in the political process more directly, but it meant a whole lot of bureaucratic reporting obligations to essentially report things that we would have done regardless. It meant reporting the advertising spending that we had undertaken during that period. It meant I had to apportion a proportion of my own salary that I had used on that campaign advertising preparation, even down to a proportion of the rent of our own office here had to be allocated, in order to meet the obligations, as we were told they would potentially apply.

Now, I'm sure you can understand from our perspective it seems fairly ridiculous, because my salary's going to get paid during that period anyway, as I'm on staff salary. We're going to pay the rent during that period anyway, regardless of whether an election is on or not. For that sort of expenditure to be captured by these arrangements—we were erring on the side of caution, because we did not want to be found in breach. But those sorts of expenditures were being captured, as well as other business-as-usual spending that we would have undertaken anyway. The cost of getting the legal advice to try to comply with these rules was also regarded as campaign expenditure, potentially, under the rules, so we had to include that as well. So, that's our first issue with the caps. The caps are the caps, whatever they end up being. That's up to the government. Others have particular views on what level they should be. We'll comply with whatever the caps are.

Our direct political campaign expenditure, in our view, is extremely limited, if almost non-existent. Our advertising, at least over the last election period, was very benign. It wasn't political, in our view, but we reported it anyway, to make sure that we weren't seen as being non-compliant. That's our first issue: The application of the rules captures business-as-usual expenditure. The second issue that we have is with the arrangements. This may have been a product of a couple of factors. It may have been the product of the fact that these were new arrangements. It may have been a product of under-resourcing within the Electoral Commission, but our repeated attempts to try to get clarity from the Electoral Commission on how these rules applied, and how we should comply, particularly including what should be in and what should be out, were very, very frustrating. This is not a reflection on the Electoral Commission by any means, because they were probably dealing with exactly the same issues that we were trying to deal with, in sorting out what the legislation meant. But that means additional time, expense, and resources were dedicated, not just to trying to comply, but also trying to understand how to comply.

We're a relatively small organisation and those sorts of resourcing issues going back and forth—Christina might be able to provide a bit more detail about it. As our Chief Financial Officer, she is responsible for a lot of that day-to-day reporting. It took up a lot of our time and resources as well. So, as we've said in our submission,

if these rules are to apply for the next election, if there are to be expenditure caps applicable for the next election period, we would very strongly hope that more guidance can be provided to make it easier for organisations like ours—and I'm sure a lot of others—to comply. The last thing we want to do is attempt to comply, make an honest mistake, and then find out that we're in breach of the rules because of some misinterpretation or some difference of opinion in relation to how they should apply, which is why previously we have just chosen to err on the side of caution, based on the legal advice that we paid for and received independently. Chair, they're probably the two main points I wanted to make and, if it's okay, I'll ask if Christina wants to make additional points in relation to our opening statement before taking any questions.

CHRISTINA LANGBY: No, that's fine.

The Hon. CHRIS RATH: Thank you for your submission and your opening statement. I have sort of been asking all of the witnesses the same question but you've pretty much answered it in your submission and your opening statement. But maybe a slightly different question is what has been the Electoral Commission's response when you call them seeking guidance? Have they tried to direct you towards getting your own legal advice? Has that been their approach so far?

CHRISTINA LANGBY: Yes, Mr Rath. They couldn't really give us much indication of what we should be including. They said that we probably just need to comply with the legislation and to get our own advice on it, which is what we did.

The Hon. CHRIS RATH: What sort of burden is involved in terms of trying to determine what sort of percentage of the rent or percentage of salaries and things like that should be included as electoral expenditure?

CHRISTINA LANGBY: I had to make assumptions, and I disclosed them in our returns, and in subsequent questioning, when they've come back and audited our return, or reviewed our return. I've just taken a pro rata basis based on our criteria, which was based on – I think it was the proportion of time that our campaigns manager and Stephen had spent on it. Similarly, we applied that sort of percentage to the rent and other associated requests.

The Hon. PETER PRIMROSE: This is a question I've put to others as well. We have heard concerns that if section 35 of the Act was removed, third-party campaigners would be able to spend enough to drown out other voices. I was wondering if you could comment on that, please.

STEPHEN GALILEE: I don't know how much others have to spend, but we don't have very much. As an indicative example, most of our campaign advertising that we spend promoting the industry or community information would be in the scale of hundreds of thousands of dollars—certainly not millions. From time to time, we may spend a little bit more than that, depending on the circumstances, but we haven't done that for a long time. What level the caps end up being set is not really an issue for us, in relation to our submission. It wouldn't affect us in that way if the business-as-usual spending, that we are undertaking anyway, wasn't going to be captured by such a broad potential definition of what is regarded as electoral expenditure. If there is a more narrow definition of what electoral expenditure is, it is going to be—I think the Electoral Commission website has a definition that says:

> Electoral expenditure of a third-party campaigner includes only the expenditure which is incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.

That can be quite subjective. We haven't argued this to the Electoral Commission, because we were concerned that we might potentially be seen as in breach of our requirements, but I would very strongly argue in relation to the pub test, as they say, an ad from NSW Mining highlighting the broad range of jobs that are available in the New South Wales mining industry and promoting it as a career for young people is not meeting that criteria. Yet that was exactly the sort of campaign spending before the last election campaign that was picked up, based on the advice that we received. When you're talking about a six-month period, that is a pretty long period of time in the context of, or from a political perspective of, a four-year term. It's a pretty long period of time to regard as a campaign period, especially when our business-as-usual spending is being captured by this cap.

The Hon. PETER PRIMROSE: One of the comments we've heard from another witness—I will simply paraphrase—is that the acting in concert caps are essentially a solution in search of a problem. Can you comment on that, please?

STEPHEN GALILEE: It's not an issue for us. We don't act in concert with anybody else on any of our campaign activity, because none of it is political, essentially. The last time we undertook political activity that would have been defined, in my view, under that definition that I just read out from the Electoral Commission, would have been a very limited series of letterbox drops in a couple of mining electorates, highlighting what we saw as the risk of some policies from The Greens party at the time—I think two state electorates. I think they are issues for other organisations and not for us.

The Hon. COURTNEY HOUSSOS: Thanks, Mr Galilee and Ms Langby, for your time. I wanted to ask a quick question. I should let you know that Unions NSW quoted from your submission in their opening statement earlier, and I think that really goes to the way that organisations that want to be participating in the political process aren't really being helped by the regulator in the Electoral Commission. That's a key concern for me. Do you think it would be useful if they provided or they sought some legal advice and then provided you with a bit more guidance? Do you think they should be producing some guides and doing some presentations to make that participation in the political process a bit easier?

STEPHEN GALILEE: Absolutely. We probably won't be acting in concert with Unions NSW.

The CHAIR: Any time soon.

STEPHEN GALILEE: I'm happy to talk to anybody—

Mr PAUL SCULLY: Don't rule it out, Stephen.

STEPHEN GALILEE: —so long as we don't breach any of our obligations as per this Act. This was an important part of our submission, and I'm guessing this might have been the bit that they quoted us on. This is not a reflection on the Electoral Commission for the last campaign. The impression we had was they just simply did not have the resources to make it as easy as possible and to provide the information that I'm sure we – and other organisations – were seeking, as we attempted to do our best to comply with our obligations. If these rules are going to apply in some form in the lead-up to the next state election, from our perspective, it would be really useful to make sure that the Electoral Commission received adequate resourcing—and that would involve legal resources as well—and produced some materials and guidance materials that they could distribute to third-party campaign organisations as registered, to make it a smoother process for us to report and comply.

I'm sure the last thing they want is to be taking phone calls from us every day of the week, asking questions about, "what does section X or section 1 of the Act involve in relation to us?" I would be in agreement with that proposal, absolutely. This is a pretty small issue, in relation to some of the other reporting obligations that are going to apply for future reforms—for example, the implementation of the recommendations of ICAC's Operation Eclipse, that the government has now committed to. I would hope that this would be a good way to show that organisations that are going to have to comply with those sorts of obligations aren't just left flying blind, essentially, in trying to comply, and doing their best endeavours, and carrying a lot of additional expense to do so.

The Hon. COURTNEY HOUSSOS: It's interesting, Mr Galilee, you make the point that you are a relatively large organisation. You have ongoing operations, so it's about apportioning part of your ongoing activities. There is also the concern with smaller organisations, more community-based organisations, that are just trying to enter into the political process for the first time and an understanding from the Electoral Commission to say, "We want to support all different types of organisations to be able to actually understand and to participate in the political process, irrespective of those challenges."

STEPHEN GALILEE: I would imagine that, for some of those community organisations, their budgets wouldn't be much smaller than ours from time to time. We don't have a massive budget, and to have to spend $20,000 or $30,000 on legal advice, to seek to comply with the reporting, when that pool potentially forms part of the amount that's coming under the cap itself is not material, but it's not insignificant when you're trying to balance out what is otherwise business as usual. What it ends up doing, perversely, is stopping us from doing things we would otherwise have done for the benefit of our members, and reporting on expenditure that, in our view, is not even politically connected. The system is forcing us to report expenditure that is actually not trying to influence a vote. It is stopping us from doing good work for our members, and for mining communities at the same time. I don't think that the outcomes as a result of this before the last election met with the objectives of what the reformers were trying to achieve, whatever that might have been.

The Hon. COURTNEY HOUSSOS: That is an excellent point. Thanks very much, Mr Galilee.

Mr PAUL SCULLY: Mr Galilee, in your submission you conceded that the previous caps are a public policy failure and should be recognised as such. Obviously the role of this Committee is to consider, if they were to continue to exist, what they might look like. Do you have any thoughts on what they "should" or "could" look like that would form a more operable regime, in your view?

STEPHEN GALILEE: The key to this working in the interests of good public policy is the definition of what's in and what's out, in our view. The reason we made that point in our submission was because of the problems that we saw occur last time around. Business-as-usual, non-political expenditure was reported. That, in our view, from as far as we can tell, was not what this was supposed to achieve. This was supposed to provide, as I understand it, some limits around how much people could spend, and some transparency on how much they

spent, pre-election, as third-party campaigners. What we reported bears little or no resemblance to any expenditure that was trying to influence a vote, oppose a candidate, or oppose a party. What we reported was expenditure that we would have incurred anyway, because the definition was so broad that we thought we had to.

If this is going to work as a piece of improved public policy in the future, my very strong view, having gone through this experience twice now—particularly before the last election—is that there has to be some pretty specific guidance relating to what's in and what's out, or at least some process through which we, for example, can get an answer on whether or not the advertising that we're undertaking is regarded as political and meets that definition as outlined by the NSW Electoral Commission.

We come across this quite regularly in our advertising, in the context of authorisations that are required when we advertise. What we regard as relatively benign political advertising promoting the industry, or the things that we do and how we do them, is often required to be authorised by different advertising regimes at state and federal level. That triggers for us a [inaudible] process that is, "Well, if they think we're political because of that, we need to consider that others will think what we're doing is political as well." That's the situation, in relation to this piece of policy, too. If you saw the ads that we were running before the last election, it would be hard to argue that they were meeting that definition. We would have run those ads anyway. In fact, next time we probably just won't run any at all, because we don't want to have to report that sort of expenditure, even though we would have done it anyway.

Mr PAUL SCULLY: That was my next question. Are what you would consider business-as-usual-type activities curbed during the election period—the cap period—so as not to accidentally fall foul of that? Does that mean that the Knights have to have their NSW Mining sponsorship taken off them if they reach the grand final?

STEPHEN GALILEE: No, there's not much risk of that this year. [Disorder] in four years.

Mr PAUL SCULLY: Four years is a long time.

STEPHEN GALILEE: A six-month period is a long period of time, and arguably that's only a month or so away. Any advertising that we potentially want to do towards the end of this year—bear in mind there's a lot of accusations and misinformation made publicly about our industry every day of the week by certain people, for various reasons. We want to be able to respond to that. One of the ways we respond to that as an industry, as lots of others do, is to provide case studies about things that we do, how we do them, and how we're trying to improve, acknowledging problems—those sorts of things.

People tell me all the time, including erstwhile political leaders like members of the Committee, that our industry needs to tell our story. We need to promote a greater understanding in the community about what we do, to try to address some of these misconceptions that are out there. For us not to be able to do that for six months, otherwise it's being regarded as somehow trying to influence an election outcome, makes it very difficult for us. We're not trying to influence an election outcome. We're just trying to defend our industry. There's generally bipartisan support for what we do as an industry—there might be some differences at the edges—but it's hard for us to understand how advertising that's promoting our industry generally could be seen as trying to influence an election outcome over a six-month period.

Mr PAUL SCULLY: I have just one last question, and this may not be something you can answer directly. Some ill-considered or not thoroughly tested changes in the current environment, given we are a matter of weeks rather than years away from the start of the October period, could end up making the system even more confused and chaotic in the lead-up to 2023—and run the risk of you and others having to expend considerable amounts on legal advice as a consequence of any changes.

STEPHEN GALILEE: Absolutely. We saw, I think before the last election, the court challenges and changes to the cap that was to apply. We weren't involved in any of those legal processes, of course. We were an observer of them because we knew that they would apply to us because we had registered. Those sorts of changes—and as you say, at this late stage—will make it difficult for us to comply in the absence of guidance and the resourcing provided to the Electoral Commission, or whoever is going to be responsible for administering the arrangements if they are in place.

The CHAIR: Thank you so much for joining us this afternoon. We may send you some further questions in writing. Your replies will form part of the evidence made public. Would you be happy to provide written replies to any further correspondence?

STEPHEN GALILEE: Yes.

The CHAIR: Thank you very much for joining us today and have a lovely afternoon.

(The witnesses withdrew.)

Mr SEAMUS LEE, Registered Officer The Greens NSW, affirmed and examined

The CHAIR: Thank you very much for joining us this afternoon. Before we start, do you have any questions about the hearing process?

SEAMUS LEE: No.

The CHAIR: Would you like to make a short opening statement?

SEAMUS LEE: No, I'll be right. Thank you, Mr Evans.

The Hon. COURTNEY HOUSSOS: Thanks very much for your time, Mr Lee. Obviously the inquiry is looking into the acting in concert and third-party provisions. Do The Greens have a view on the acting in concert provisions?

SEAMUS LEE: Yes, we think they should be repealed. We think that they are not helpful at this point. The Greens are also mindful of what Justice Edelman has said: that the scope is probably too broad and there's no real legislative—obviously, the High Court in Unions NSW [No 2] did not decide. But, obviously, it seemed—at least, certainly, Justice Edelman probably would have thrown it out. But, obviously, the rest of the court decided, because they threw out the caps. There was no need to—so, yes, we're supportive of the repeal. And, obviously, The Greens have got a history of supporting collective action and other things. The fact that, in theory, multiple groups just putting their name to a press release potentially could be captured by that provision—because it's just about advocating for one goal, not necessarily actually being affiliated with Unions NSW, or anything like that—it's too broad and we think it should be repealed.

The Hon. COURTNEY HOUSSOS: That's very helpful. One of the things that we've been dealing with today is just about the questions of administration. Mr Rath and I have asked some similar questions around the barriers to entry that that puts in place for organisations. I mean, The Greens—the nature of them, they would be working with plenty of community-based organisations who might usually participate in the political process. Have you got any feedback from them—or anecdotally, that you have heard—about what these laws do?

SEAMUS LEE: Personally, I don't believe so. I will take that on notice, just to find out if others have had any feedback—certainly, from our members of Parliament. Obviously, one of the things is New South Wales does run one of the more complex regimes—like the special electoral funding, and electoral compliance. A lot of smaller community groups may not be as aware of some of the reporting requirements, and some of the other requirements that are brought up. And, obviously, especially when you're talking about a by-election as well, in that it's such a short period of time, people may not realise what the caps are. And then, suddenly, they've triggered the cap—which is at the moment, I think, just over $20,000 for third parties. Obviously The Greens want to have it as transparent as possible. But we need to have as many voices as possible heard in the political process. That's the best way to get good outcomes.

The Hon. COURTNEY HOUSSOS: Yes. I mean, the thing about the acting in concert provisions I mentioned with Unions NSW earlier is that it doesn't apply to anyone else that caps apply to. The whole point behind caps is about evening the playing field. But then we have this additional onerous requirement on third-party campaigners, while we still really do want to be encouraging—or, certainly, I would say I would, and I would say the Labor Party want to be encouraging, and I'd say The Greens probably do as well. But I'd be interested in your thoughts about encouraging people to participate in the political process. Adding these additional layers—these additional restrictions—actually stops that. Would you agree?

SEAMUS LEE: Yes, I think so. I think the law is always written—sometimes in legalese. This is probably not as bad an example. Certainly, sometimes, for smaller community groups, it is harder for them to get their head around. I think there needs to be robust funding for the NSW Electoral Commission to help smaller community groups, in particular, to understand what would be needed to do. And, obviously, we don't want to have significant barriers to entry. Also, at the same time, we want to know who is funding campaigns, and other things. Obviously, we don't want to see astroturfing. We want to know who is behind any kind of astroturfing campaigns—on social media, in particular. And, obviously, these days, in general, because of advertising—it's much cheaper to advertise on Facebook, Twitter, Instagram, TikTok, and other things, compared to buying a billboard and other things. It's a lot less expensive for people to spend money, and more effective for them to spend money on social media advertising.

Knowing who is behind that—and, obviously, part of that also falls into the world of the authorisation regime as well. Not just from expenditure, but knowing who is putting these things up as well. It's a difficult balancing act, and I think the acting in concert provisions don't help with that. The caps, and certainly the anti-avoidance provisions, I think, in the Electoral Funding Act, go a fair way but, obviously, there's always

importance for overviews, like this Committee is doing. As we've seen with the select committee that's inquiring into the general conduct of elections, it's important that we have regular reviews of these regimes to see if they are correct or not.

The Hon. COURTNEY HOUSSOS: Of course. I've just got two final questions. Do you want to just explain—in case we do actually have anyone watching who might be interested to know—what astroturfing is?

SEAMUS LEE: Yes. Astroturfing, from my understanding, is generally where it is kind of like one party creates a lot of different accounts to basically push out the one message, generally on social media. You could have one funder basically looking like they are about 15, 20, 30, maybe 100 different organisations or whatever, but it is actually all the one party. So having that transparency is just as important as—obviously, with Facebook and other things, what they have done in terms of the sort of ad transparency has been helpful. But there's probably more to do, because we all know that you could register an organisation and then run under that organisation, but we don't actually know who's behind that organisation. And, obviously, we may not know where their funding is coming from as well. That's not necessarily a major concern of a lot of community groups but, obviously, the problem per se is—one of the potential problems is that people might get involved in these local community groups and view them as a stalking horse, sometimes, as well, sort of a thing.

The Hon. COURTNEY HOUSSOS: Mr Lee, I'm not sure whether you've been watching this morning, but we've actually heard the reverse is kind of happening in practice. So that might be happening online and on social media, but in terms of participants in the political process, we actually heard from Unions NSW today that they have significant unions who usually would participate in an election campaign but because the barriers are so difficult—the Minerals Council just put it at between $20,000 and $30,000 that they need for legal advice just in order to participate in the program. So we have almost got the reverse. It seems to be that we've got the reverse happening in New South Wales.

SEAMUS LEE: Yes. I can speak, not necessarily from third-party campaigners, but certainly from The Greens' point of view, I know that we have had to, over the last few years, spend much more money internally on everything, from our auditing and other things. The other problem is that the Electoral Commission is not a full-on legal service—and I don't think it should be. It shouldn't be there to make legal judgements about whether or not you're qualifying under these sorts of—they can give advice. Obviously, the complex regime that we run in this state, for good reasons, means that third parties do end up having to spend money—significant money, probably—on legal advice and other things. I think the simpler we can try to make the rules whilst still keeping the transparency and accountability goals, the better, in a broad sense. But, obviously, we still want to have that transparency. The Greens obviously have a view that, overall, caps are—expenditure caps are probably too high, in The Greens' perspective. But, obviously, we're not going to win that fight.

But, obviously, there's still an issue around the by-elections caps, in particular, given the Unions NSW judgement. Whilst it threw out the general caps, it didn't discuss the by-election cap. So there's still potential risk there that that's actually—but, yes. And, obviously, by-elections are very short. Legally, they are short and sharp elections—short and sharp periods. But, as we all know, the former member for Willoughby announced late last year that she was going to resign, but the by-election didn't happen until this year. So, in theory, a third party could actually spend up, and actually start campaigning easily from last year and, if they wanted to, sort of build a narrative or whatever, and most of that time, potentially, wouldn't be under the caps as well. The cap only kicks in from the writ onwards.

The Hon. CHRIS RATH: Did you have any views about what the cap should be?

SEAMUS LEE: Yes. I don't have any particular—I'd have to take on notice and get back to you in terms of the dollar figures. But I think we said in our submission that the general third-party cap should be the equivalent—I think, if my memory serves—of a council-only party. I think that was for a general cap. I don't know if we actually put a dollar figure in for by-elections specifically. I note that in the Electoral Legislation Amendment Bill that was introduced a few weeks ago into the Legislative Assembly that the government is moving to do that—to put those numbers back, I think, in that bill. That's off the top of my head.

The Hon. CHRIS RATH: Slightly going off the terms of reference—but it is related—I suppose, in principle, you'd probably support public funding of elections?

SEAMUS LEE: Yes.

The Hon. CHRIS RATH: So you're not relying on donations coming in. I assume that's The Greens' position.

SEAMUS LEE: Yes. Certainly, that's where I think—I want to be certain and talk to our portfolio holder about that. But that's generally where we'd be heading. The less that parties and potentially third-party—but

obviously it's harder for third-party campaigns, because at the moment there's no electoral funding for them. For parties, certainly, we'd like to see—and obviously there's currently a disparity between how much a third-party campaigner can spend, versus parties. Obviously, it's much larger in a general election than it is in a by-election. It's also worth remembering one of the other things is that parties themselves—parties as in separate to the candidate entered—don't actually have a cap on them in by-elections. It's all about the party candidate cap.

I think Unions NSW raised in their submission that there is a potential issue there whereby, if a party doesn't stand a candidate in a by-election, they could actually still spend money and not be capped. I think their example was using the Upper Hunter by-election, and the thought being the Liberal Party, whilst not standing, could actually spend money in support of the National Party candidate, but there's no expenditure cap, because the caps all talk about people who are actually either third parties, or parties that are actually standing candidates. So there's no concept of a party that's not standing a candidate in an election. That might be something for the Committee to consider – but obviously not necessarily in this inquiry, but maybe in a future inquiry.

The Hon. CHRIS RATH: I am just interested in how—not that there are any plans to go to full electoral funding. But I'm just interested in how third-party campaigners would relate to a system where there would be full electoral funding for political parties, because you then obviously don't want a situation where third-party campaigners can spend as much as they want and then political parties are constrained by the electoral funding that they're getting from the government.

SEAMUS LEE: I completely would agree with that. I think that's mirrored in the court's view in the Unions NSW No. 2 or whatever—in that I think they don't want to see one side being preferenced either way. I think where they were coming down was, they were saying the previous set of caps for third-party campaigners were not—it was too biased towards parties and candidates. I think we do want to have a world where everybody can have their say. Obviously, I think we need to have—I might want to take that on notice, about how third-party campaigners and check with a couple of other people on that one. But, yes, that would be certainly a challenge. I don't know what a regime would look like to support to—certainly we'd need some level of caps. I don't know how that would work.

The CHAIR: Thank you, Mr Lee, for coming and attending today. We may send you some further questions in writing. Your replies will be part of the evidence and be made public. Would you be happy to provide written replies to any further questions?

SEAMUS LEE: Of course, whatever the Committee needs.

The CHAIR: Thank you so much for attending today.

(The witness withdrew.)

(Short adjournment)

Mr GLENN BACIC, Director Governance, NSW Labor, before the Committee via videoconference, affirmed and examined

The CHAIR: Mr Bacic, thank you for joining us this afternoon. Would you like to make a short opening statement before we begin questioning?

GLENN BACIC: I'll make it short and sweet. Obviously, the Committee is in possession of the submission that was made by NSW Labor in May of this year. Just refamiliarising myself with that submission—obviously, that went to the point of a cap for third-party campaigners for elections in general. Obviously, now that has been picked up in the bill that's before the Parliament that was introduced in June. I do note that there was nothing particularly said in the submission regarding third-party caps for by-elections—so, obviously, happy to talk to that or respond to questions and/or both. Otherwise I would hope that the submission is reasonably succinct and straightforward.

The Hon. PETER PRIMROSE: Mr Bacic, we've heard concerns that, if section 35 was removed, third-party campaigners would be able to spend enough to drown out other voices. I'm wondering if you could comment on that, please?

GLENN BACIC: Certainly. I'd probably begin by saying that, obviously, caps for third-party campaigners came in 10 or 11 years ago. That has worked reasonably well, subject to some amendments being made. There has been a bit of back and forth on those provisions, but the acting in concert—sorry, Mr Primrose, can you just repeat that question for me?

The Hon. PETER PRIMROSE: We've heard from a number of witnesses the suggestion that, if section 35 was to be removed from the Act, third-party campaigners would be able to spend enough to drown out other voices, including candidates. Would you like to comment on whether you believe that would occur?

GLENN BACIC: Thanks for the repeat of the question. My thought process was going on the same line, and that is to say that, the amendment through the Electoral Funding Act in 2018, that brought that provision in, was a new feature. Turning to the literature I've been privy to previously, certainly I could not see a phenomenon to support why that provision was there. I don't believe there was a strong evidence base for section 35. I don't see that there was any great disadvantage without that provision in there for any particular candidate, or candidates and/or parties. Certainly, the party's position would say that that's a feature in the present Act that should not be there because of the mischief that it makes.

The Hon. COURTNEY HOUSSOS: Mr Bacic, thanks very much for your time and for your submission. I have one quick question around the advice that is provided to third-party campaigners. We've heard today that individual third-party campaigners need to seek their own legal advice and that that is then covered by the cap. Is that your experience? Do you find that the Electoral Commission really does leave it to you to get your own advice and make your own determinations, or are they quite proactive in providing that advice?

GLENN BACIC: I would say that the advice provided by the Electoral Commission is pretty constrained to actually what the provision of the Act is. Generally, I would say that it doesn't go anywhere beyond what the words on the paper are. In my experience, advice from the Electoral Commission is not helpful. That's not necessarily a criticism of the Electoral Commission; I think it is generally a feature of the Commission, to constrain any advice to the literal interpretation of what the Act provides. I might go on to say that, obviously we've had our own advice, as I expect most major parties and/or third-party campaigners would, in respect of what the provisions of the Act are at the moment. I don't think the present construction of section 35 is particularly clear. I think the associated penalties within the Act make stakeholders and, indeed, our own actions, very cautious about how that provision of the Act could be interpreted, which I think is generally a disadvantage of stakeholders being able to exercise their legitimate rights to campaign on issues that are important to their stakeholder bases.

The Hon. COURTNEY HOUSSOS: Yes, absolutely. I note that your recommendation says that the acting in concert provision should be repealed and that we need to look at the third-party campaigners' caps to be at an appropriate level. One of the recommendations we heard from Unions NSW this morning is that particularly the caps for by-elections are just way too low at $21,600, I think it is, for a six-week campaign for an electorate of—

Mr PAUL SCULLY: Or longer.

The Hon. COURTNEY HOUSSOS: Exactly. A point that my colleague Mr Scully made earlier today is that by-elections vary in length. In your experience—and you're making electoral disclosures—do you find that $20,000 is quite a small amount of money to be spending in a single electorate?

GLENN BACIC: Yes, I do. Obviously we're a political party, and I think it's always probably fair to say that our spend, as opposed to a third-party campaigner, would be—and, in most cases, should be—on the basis that a political party and/or candidate is trying to appeal to the electorate on a wide range of issues. A third-party campaigner would generally have a narrower set of issues. I think it's important to say that there are legitimate reasons why a third-party campaigner cap should be less than a party and/or candidate. That said, though, I do note that the ratio of a cap for a third-party campaigner, as opposed to a candidate—I think it was about a one to 10 or one to nine ratio about 10 years ago—has sort of crept up, if you like, to about a one to 12 ratio. So there is already a comparative disadvantage there. The other point I would make is that, I think, in the last 12 years, what would be regarded as a minimum sort of base for effective campaigning has increased as well. Certainly, that cap for third-party campaigners is a very low figure.

Mr PAUL SCULLY: Mr Bacic, there was a suggestion earlier that the acting in concert provisions, or the section 35 provisions, are essentially a solution looking for a problem. If there was a problem in the past that it had previously addressed, do you feel that that problem continues to exist, or that it just simply acts to limit third parties in their activity?

GLENN BACIC: I think it's the latter. I was hoping to try to make the point earlier that I don't think there was any great mischief prior to the provisions back in 2018. I think, by and large, it was a pretty fair field for third-party campaigners, candidates, and political parties.

Mr KEVIN CONOLLY: Mr Bacic, you said that the costs of campaigning have increased over the years. You reflected, in particular, on third-party campaigners as you said that. Does that also reflect on the cap for candidates and parties? Has that become less realistic over time, that the costs outstripped what's available to them to campaign and do their job to reach electorates?

GLENN BACIC: I think we're relatively comfortable with the caps for candidates and parties. We obviously take a pretty fundamental view, that there should be caps, and those caps should be reasonable to ensure that there is overall fairness in parties and candidates to promote their views in such a way that it doesn't give rise—I'm sure I'm not being controversial here—to the phenomenon that plays out in the federal sphere, with the United Australia Party, for example. So we're comfortable with the notion of caps. We don't believe that expenditure caps that apply to candidates and parties at the moment are necessarily restrictive. I just simply make the point that when you are looking at a third-party cap of $21,000-what have you, I think that's pretty unrealistic, to conduct a campaign in a by-election.

Mr KEVIN CONOLLY: Just to take up your point about the purpose of caps, your point was to make it fair for all. The objects section in the Act, section 3, actually refers to the objects of this being to reduce corruption or avoid corruption—I'm not sure what the exact word is—or undue influence on the government of this day. You've referred to what you saw in the federal sphere as perhaps some undue influence coming from a truckload of money. Do you think that has been an issue in New South Wales, or are these caps not really justified on those basis? Are they achieving those ends or are they not really well directed to those ends?

GLENN BACIC: I think we would say that the existence of caps generally, putting aside the issue for third-party campaigners, has worked well since they were introduced by the Keneally Government.

The CHAIR: Thank you for appearing before us today and for your participation this afternoon. We may send you some further questions in writing. Your replies will be part of your evidence and be made public. Would you be happy to provide written replies for any further questions?

GLENN BACIC: Of course.

The CHAIR: That concludes the public hearing today. I thank witnesses who appeared today, Committee members, Hansard, staff of the Department of Parliamentary Services and the Committee staff for their assistance. Thank you so much for your participation in today's proceedings.

(The witness withdrew.)

The Committee adjourned at 14:31.