

**Submission
No 4**

INQUIRY INTO ELECTORAL FUNDING AMENDMENT BILL 2023

Organisation: Liberal Party of Australia - NSW Division

Date Received: 29 August 2023

LIBERAL PARTY OF AUSTRALIA

NEW SOUTH WALES DIVISION

State Director

29 August 2023

The Hon Jeremy Buckingham MLC
Chair
Portfolio Committee 1 – Premier and Finance
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Mr Buckingham,

Thank you for the opportunity to make a submission to the inquiry by the Legislative Council's Portfolio Committee 1 – Premier and Finance into the *Electoral Funding Amendment Bill 2023 ('Bill')*.

I am particularly grateful for this opportunity, as the last time the applicable caps on the expenditure of third-party campaigners was explored by the Joint Standing Committee on Electoral Matters ('JSCEM') in 2022, relevant stakeholders, including The Liberal Party of Australia, NSW Division ('Liberal Party'), were focussed on campaigning ahead of the federal election that was called during the Inquiry's submission period and was not practically able to make a written submission. I was unable to provide oral evidence to the JSCEM in July 2022 as I was recovering after hospitalisation for a cardiac procedure.

The proposal contained in this Bill to increase ten-fold the applicable cap for third-party campaigners at by-elections, as well as their additional cap for individual Legislative Assembly seats at general elections, is a selective adoption and expansion of the recommendations made by the aforementioned inquiry that heard no evidence from either the Liberal Party or the National Party of Australia – NSW ('National Party'). We would argue that is an unreliable basis for making amendments to the existing law.

Fundamentally, the Bill disturbs the balance that already exists between the caps for third-party campaigners and candidates in the *Electoral Funding Act 2018 ('EF Act')*. It destroys the relativity between candidates and non-candidates – and is particularly harmful to independents.

Put simply, this amendment will distort the democratic process and have a direct impact on electoral outcomes in NSW.

This Bill seeks to benefit trade unions and their political wing, the Australian Labor Party (NSW Branch) ('Labor Party'), by allowing an excessive uplift in the cap for third-party campaigners – an almost 10 fold increase.

Members of the Committee should reflect on the original purpose of the EF Act, which was to limit spending on elections to protect them from being 'bought'. These amendments are completely out of step with the purpose of the legislation.

Moreover, the proposed amendments to section 29(11) and 29(12)(b) contained in this Bill cannot be viewed in isolation. Rather, they are part of a complex regulatory framework, which includes caps on both political donations and electoral expenditure.

It is already an uneven playing field – one that significantly advantages the political wing of the trade union movement, the Labor Party, over every other registered political party and independent candidate that participates in the NSW electoral process. Through its interdependent relationship with the trade union movement, the Labor Party receives significant financial and electoral benefits through several means:

- Affiliation Fees;
- Political Donations; and
- Third-party campaigns run in support of them.

I will address each of these issues in detail in this submission.

Background

This Bill seeks to amend sections 29(11) and 29(12)(b) of the EF Act and is designed to increase the expenditure caps for third-party campaigners in by-elections and general elections.

An examination of the history of how we got to this point is warranted:

- On 10 March 2022, the former Attorney General, the Hon Mark Speakman SC MP, made a referral to the JSCEM to look at the size of the expenditure caps for third-party campaigners at by-elections, as set out in section 29(11), and the consorting provisions between third-party campaigners in section 35.
- On 23 March 2022, terms of reference were adopted and key stakeholders were asked for public submissions with a closing date of 22 April 2022.
- On 10 April 2022 the federal election was announced by the former Prime Minister, the Hon Scott Morrison MP.
- On 22 April 2022, submissions had been made to the committee by various unions, the Labor Party, The Greens, the NSW Electoral Commission, Business NSW, the NSW Minerals Council but not the Liberal Party or the National Party, for the reasons mentioned earlier.
- On 21 May 2022 the federal election took place.
- On 21 June 2022, the Hon Gabrielle Upon MP, on behalf of the former Attorney General, introduced the *Electoral Legislation Amendment Bill 2022* to make a number of changes to the EF Act including the creation of caps for third-party campaigners at general elections (not by-elections), which would apply to the 2023 State election in circumstances where the

general election caps had been removed entirely by the High Court of Australia in *Unions NSW v New South Wales [2019] HCA 1*.

- On 29 June 2022, Unions NSW commenced proceedings in the High Court of Australia challenging the validity of sections 29(11) and 35 of the EF Act.
- On 27 July 2022, the JSCEM took oral evidence from the Electoral Commissioner, various unions, the Labor Party, The Greens, but not the National Party or the Liberal Party, for the reasons explained earlier.
- An amendment to the *Electoral Legislation Amendment Bill 2022* was passed in the Legislative Council that section 35 of the EF Act be repealed and that was agreed to by the Legislative Assembly on 26 October 2022. I understand that was the price to ensure the legislation passed, and restoring expenditure caps applicable to third-party campaigners at the coming general election, which were removed as a result of the High Court decision in 2019.
- On 16 and 17 November 2022, oral submissions were delivered in the High Court on the challenge by Unions NSW with respect to sections 29(11) and 35 of the EF Act. The High Court reserved its decision.
- On 22 November 2022, the JSCEM delivered its report. The report made 3 recommendations in respect of the management of third-party campaigners acting in concert and one recommendation to lift the cap for third-party campaigners at a by-election to \$198,750 from the existing cap of \$21,600. We note that the 3 recommendations made by the JSCEM in respect of acting in concert are not addressed in this Bill. We would argue that all 4 recommendations of the JSCEM are in fact interdependent.
- On 15 February 2023, the High Court delivered its decision and made its orders in *Unions NSW v New South Wales [2023] HCA 4*¹. The High Court did not have to make any reasoned decision in the matter as section 35 was repealed by parliament in October 2022 (as noted above) and the State of New South Wales conceded that as a consequence of the JSCEM report, the applicable cap in section 29(11) could not be argued to be proportionate and valid because its amount was so different and therefore could not be defended as a permissible burden upon the implied freedom of communication on political matters, contrary to the Constitution of the Commonwealth of Australia. The Court did not provide a detailed analysis of either provision concluding the legal challenge became redundant even though Unions NSW pressed it to do so.

Because of the High Court's decision in *Unions NSW v New South Wales [2023] HCA 4* there are currently no valid caps applicable to third-party campaigners at by-elections.

¹ [2023] HCA 4 at [8]

Electoral Funding Amendment Bill 2023

Section 29(11) of the EF Act states:

For a by-election for the Assembly, the applicable cap for a third-party campaigner is \$20,000 for each by-election.²

As noted earlier in this submission, the JCSEM report recommended that the expenditure cap for third-party campaigners at by-elections be increased significantly to \$198,750 together with the development of other restrictions on third-party campaigners, which do not appear in the Bill. When indexed for inflation, the applicable cap proposed in the Bill is set at a higher amount of \$225,900.

Section 29(12) of the EF Act states:

The applicable cap for parties and third-party campaigners is subject to an additional cap (within the overall applicable cap) in relation to State general elections, or by-elections in more than one electoral district, for electoral expenditure incurred substantially for the purposes of the election in a particular electoral district, being—

(a) in the case of a party—\$61,500 in respect of each such electoral district, or

(b) in the case of a third-party campaigner—\$24,700 in respect of each such electoral district.

The proposed amendment of section 29(12)(b) contained in this Bill represents a significant uplift on the additional cap for third-party campaigners in relation to State general elections from \$30,400 (after indexation) to \$225,900 without any provisions concerning collusion between parties and/or third-party campaigners.

It is important to note that this matter was not the subject of any consideration by the JCSEM in its report in November 2022.

By reference to its website, the NSW Electoral Commission advises that the following caps will apply, in accordance with section 29 of the EF Act, for candidates that contest the 2027 State election (and any by-elections that take place during this parliamentary term)³:

Category	Cap
Party with more than 10 endorsed Legislative Assembly candidates at a general election	\$150,700 multiplied by the number of electoral districts in which a candidate is endorsed by the party
Party that endorses candidates in a group for the Legislative Council but does not endorse any	\$1,579,400

² On 15 February 2023, the High Court of Australia in *Unions NSW v New South Wales*[2023] HCA 4 declared that the cap imposed by section 29(11) is invalid.

³ What are the expenditure caps for state elections? NSW Electoral Commission - <https://elections.nsw.gov.au/funding-and-disclosure/electoral-expenditure/caps-on-electoral-expenditure/what-are-the-expenditure-caps-for-state-elections> accessed on 28/08/2023.

Category	Cap
candidates for election to the Legislative Assembly or does not endorse candidates in more than 10 electoral districts	
Independent Legislative Council group at a general election	\$1,579,400
Endorsed Legislative Assembly candidate at a general election	\$150,700
Independent Legislative Assembly candidate at a general election	\$225,800
Ungrouped Legislative Council candidate at a general election	\$225,800
Candidate at a Legislative Assembly by-election	\$301,200
Third-party campaigner at a general election	\$1,464,200 if the third-party campaigner was registered before the commencement of the capped state expenditure period for the election \$732,200 in all other cases
Electoral district cap for a party	\$75,500 within the party's overall expenditure cap
Electoral district cap for a third-party campaigner	\$30,400 within the third-party campaigner's overall expenditure cap
Maximum amount for expenditure incurred for campaign office accommodation that is not included in the electoral expenditure cap	\$22,800

The proposed applicable caps for third-party campaigners contained in this Bill will be roughly the same as the applicable caps that will apply for an Independent candidate or a candidate endorsed by a registered political party at the next general election.

This Bill clearly disturbs the balance between the caps for third-party campaigners and candidates. It is also a significant departure by Labor from the position they adopted when they were last in Government, having introduced caps on donations and electoral expenditure in the first place.

In 2010, the Keneally Labor Government introduced the *Election Funding and Disclosures Amendment Bill 2010*, which sought to amend the *Election Funding and Disclosures Act 1981* in respect of political donations and election campaign expenditure and funding for State elections. Among the reforms, the Bill imposed caps on political donations and electoral communication expenditure and provided instead for an increase in public funding for State election campaigns.

Section 95F of the Act as passed set applicable caps on electoral communication expenditure on State election campaigns:

(1) General

The applicable caps on electoral communication expenditure for a State election campaign are as provided by this section, as modified by section 95G.

(2) Parties with Assembly candidates in a general election

For a State general election, the applicable cap for a party that endorses candidates for election to the Assembly is \$100,000 multiplied by the number of electoral districts in which a candidate is so endorsed.

(3) Subsection (2) does not apply to a party that endorses candidates in a group for election to the Council and endorses candidates for election to the Assembly in not more than 10 electoral districts.

Note. The total cap for a party that endorses candidates in all 93 electorates at a general election is \$9.3 million.

(4) Other parties with Council candidates in a general election

For a State general election, the applicable cap for a party that endorses candidates in a group for election to the Council, but does not endorse any candidates for election to the Assembly or does not endorse candidates in more than 10 electoral districts, is \$1,050,000.

(5) Independent groups of candidates in Council general elections

For a periodic Council election, the applicable cap for a group of candidates who are not endorsed by any party is \$1,050,000.

(6) Party candidates in Assembly general election

For a State general election, the applicable cap for a candidate endorsed by a party for election to the Assembly is \$100,000.

(7) Independent candidates in Assembly general election

For a State general election, the applicable cap for a candidate not endorsed by any party for election to the Assembly is \$150,000.

(8) Non-grouped candidates in Council general election

For a periodic Council election, the applicable cap for a candidate who is not included in a group is \$150,000.

(9) Candidates in Assembly by-election

For a by-election for the Assembly, the applicable cap for a candidate (whether or not endorsed by a party) is \$200,000.

(10) Third-party campaigners

For a State general election, the applicable cap for a third-party campaigner is:

- (a) \$1,050,000 if the third-party campaigner was registered under this Act before the commencement of the capped expenditure period for the election, or*
- (b) \$525,000 in any other case.*

(11) For a by-election for the Assembly, the applicable cap for a third-party campaigner is \$20,000 for each by-election.

(12) Additional cap for individual Assembly seats

The applicable cap for parties and third-party campaigners is subject to an additional cap (within the overall applicable cap) in relation to State general elections, or by-elections in more than one electorate, for electoral communication expenditure incurred substantially for the purposes of the election in a particular electorate, being:

- (a) in the case of a party—\$50,000 in respect of each such electorate, or*
- (b) in the case of a third-party campaigner—\$20,000 in respect of each such electorate.*

(13) For the purposes of subsection (12), electoral communication expenditure is only incurred for the purposes of the election in a particular electorate if the expenditure is for advertising or other material that:

- (a) explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate, and*
- (b) is communicated to electors in that electorate, and*
- (c) is not mainly communicated to electors outside that electorate.*

(14) Indexation of capped amounts

Each of the amounts referred to in this section is an adjustable amount that is to be adjusted for inflation as provided by Schedule 1.

The proportionality of the applicable expenditure caps in the previous Act here is worth noting here.

In the case of a by-election for the Assembly, the applicable cap for a candidate (whether or not endorsed by a party) was set at \$200,000 and for a third-party campaigner it was set at \$20,000, or 10 per cent of the candidate cap.

For a general election, assuming that a third-party campaigner registered before the capped expenditure period for the election, their applicable cap was set at \$1,050,000, with the additional cap for individual Assembly seats (for electoral communication expenditure incurred substantially for the purposes of the election in a particular electorate) set at \$20,000 in respect of each such electorate.

The total cap for a registered political party that endorsed candidates in all 93 electorates at a general election was \$9.3 million (93 x \$100,000), with the additional cap for individual Assembly seats (again, for electoral communication expenditure incurred substantially for the purposes of the election in a particular electorate) set at \$50,000 in respect of each such electorate.

In the context of a by-election and a general election, the applicable cap for a third-party campaigner was set at approximately 10 and 13 per cent respectively of the caps applicable to a candidate endorsed by a political party.

The Keneally Labor Government's legislation was supported by the Liberal and National Parties and but for some minor amendments, it remained in place for nearly 8 years.

An Expert Panel, which comprised of the respected public servant, Dr Kerry Schott AO, and two former Members of Parliament, Mr Andrew Tink AM and the Hon John Watkins AM, reported on options for possible reform of political donations in 2015.

The panel's recommendations included:

Recommendation 31: that the cap on electoral expenditure by third-party campaigners be decreased to \$500,000 (adjusted annually for inflation); and

Recommendation 32: that third-party campaigners be prohibited from acting in concert with others to incur electoral expenditure that exceeded the cap.

A JSCEM inquiry into the report's recommendations and the Baird Government's response in 2016 then preceded the introduction of the *Election Funding Bill 2018*.

Recommendation 7 of the JSCEM report proposed that, before decreasing the cap on electoral expenditure by third-party campaigners to \$500,000, the Government should consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case within that reduced expenditure limit.⁴

Evidence was given at the JSCEM hearings of expenditure by a number of unions for the 2015 State election that significantly exceeded \$500,000 and business organisations that came close to that amount, although most of the expenditure was measured across the 2014-15 financial year, rather than the six months leading up to the election.⁵

This evidentiary issue became a key point in the High Court's decision in *Unions NSW v New South Wales [2019] HCA 1*. The judgment confirmed that no material was placed before the court to suggest that such an evidentiary analysis had been undertaken by the Government.⁶ The NSW Liberal Party sought leave late in the proceedings to be joined as an interested third party to do just that, but its leave was refused by the Court.

⁴ JSCEM Inquiry, Final Report of the Expert Panel – Political Donations and the Government's Response, 2016, at [7.22].

⁵ *Ibid* at [7.17]-[7.18]

⁶ [2019] HCA 1 at [26]

In rushing the current Bill through the parliament, the Labor Party clearly does not want any by-elections to be contested without a cap applying to third-party campaigners, as this could arguably assist a well-funded Teal, The Greens or other candidate, as much as it would assist them.

Having contended in his second reading speech that a cap on third-party campaigners set at about 75 per cent of the cap on candidates would seem appropriate, the Hon Anthony D'Adam MLC on behalf of the Special Minister of State, the Hon John Graham MLC, indicated that the Minns Government was committed to referring this issue to the JSCEM again and then responding with more legislation after they report.

It is clear that the government is aware that these new caps dramatically disturb the balance between candidates and third party campaigners. However, it has provided no evidentiary basis for the proposal contained in this Bill.

The government is relying on the recommendation made by the JSCEM to increase the cap applicable to third-party campaigners to \$198,750 as it was suggested as being an appropriate level by the NSW Nurses and Midwives' Association ('NSWNMA'). The NSWNMA justified setting the applicable cap at this amount based on a scenario where at least 3 by-elections in metropolitan seats were taking place in a similar timeframe, and where television and radio advertising was being bought.⁷

The assumptions built into the NSWNMA's suggested cap level are worth exploring in detail.

There are approximately 52 electoral districts in the Sydney metropolitan area (and the relevant TV and radio coverage areas), which has a population of around 5.1 million people.

In the redistribution of electoral districts that took place in 2021, the average enrolment at the relevant future date (17 April 2023) was estimated to be 59,244 electors. Therefore, if 3 by-elections took place in metropolitan seats, on average 177,723 electors would be casting a vote.

Why then, would the NSWNMA consider TV and radio advertising in such a scenario, when, at best, such advertising would be directly relevant to only 5.8 per cent of the city's voting population?

I am not aware of any by-elections in the Sydney metropolitan area where any major political party has engaged in TV and radio advertising of the kind proposed by the NSWNMA. Instead, the major parties rely on local media and other campaign communication strategies to get a better return on the advertising expenditure so that it is not going to 94 per cent of an audience that is not voting at the by-elections.

In any by-election contests, the NSWNMA will naturally have two constituencies – the voters in the electoral districts they may contest, and the members they are campaigning on behalf of.

It would seem, though, that spending up to \$100,000 on TV advertising and a further \$35,000 on radio advertising on 3 by-election campaigns is more about delivering messages to their members than it is about the voters.

⁷ JSCEM inquiry, Caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the *Electoral Funding Act 2018, 2022*, Submission 7, NSW Nurses and Midwives Association, page 4.

While advocating for a significant uplift in the applicable cap on third-party campaigners, the NSWNMA argued the acting in concert provisions should also be repealed because:

“There are many different ways in which unions can work together on campaigns – both industrial and in the past, electoral campaigns. Building scale and mobilising large numbers becomes more difficult without joint campaign efforts. Being unable to rely on any resources by other unions/organisations limits the NSWNMA’s capacity to promote issues beyond the NSWNMA’s membership. While joint campaigning is not always appropriate, depending on the issues and the circumstances, being able to campaign jointly is an important aspect of making campaigns effective.”⁸

It is our strong view that all of the relevant issues should be taken into account, rather than rushing to legislate these caps without dealing with the gross inequity of third-party campaigners being able to collude in their campaigning.

To achieve the original purpose of the EF Act, the cap applying to third-party campaigners should be adjusted down from that suggested in the Bill so that the same relative relationship between the applicable caps for third-party campaigners, and party and independent candidates, is maintained at levels consistent with the relativities set out in the previous Act (i.e. between 10 to 15 per cent of the applicable cap for a candidate). The alternative proposed in this Bill puts the applicable caps for third-party campaigners at parity with the applicable caps for candidates. Putting them the same is unfair as one side of a political contest will be able to significantly outspend the other side of the contest. Put another way, the side restrained from spending an amount which is equal to the amount of the opposing political party and their associated third-party campaigners will suffer an impermissible burden on their constitutional right to the freedom of political expression.

The nature of the likely third-party campaigners also needs to be considered. Most commonly, they are trade unions who are directly affiliated with the Labor Party.

The Relationship between the Labor Party and Trade Unions

The Labor Party is a political party registered under Part 6 of the *Electoral Act 2017* (***‘Electoral Act’***). The Liberal Party endorses candidates for election to the Parliament of New South Wales.

The Liberal Party is in a coalition with the National Party. The National Party is also a political party registered under Part 6 of the Electoral Act. Usually the Liberal Party does not run candidates against the National Party with the effect that the two parties endorse between them 93 candidates for the 93 seats in the Legislative Assembly and a joint ticket for the Legislative Council.

For the first time since 1999, ‘three-cornered contests’ took place at the 2023 State election in the Districts of Port Macquarie and Wagga Wagga, where both parties nominated candidates.

The main political opponent of the Liberal Party is the Labor Party. The Labor Party is also a political party registered under Part 6 of the Electoral Act. It usually endorses candidates in all of the 93 seats in the NSW Legislative Assembly.

⁸ Ibid, page 5.

By reference to publicly available information on its website, rule A.3 of the Labor Party⁹ states:

The Party is made up of:

- *affiliated trade unions; and*
- *individual members.*

The Party is an unincorporated entity.

By reference to publicly available information on its website, there are currently 19 trade unions affiliated with the NSW Labor Party:

- Australian Institute of Marine and Power Engineers
- Australian Manufacturing Workers Union
- Australian Services Union, Services Branch
- Australasian Meat Industries Employees Union, NSW Branch, Newcastle Branch
- Australian Workers Union
- Construction Forestry Mining and Energy Union (NSW Branch) ('CFMEU') Construction and General Division
- CFMEU Northern Mining and Energy District Branch
- Communications, Electrical, Plumbing Union, Postal and Telecommunications Division, Telecommunications and Services Division, Plumbers Division
- Community and Public Sector Union
- Electrical Trades Union
- Finance Sector Union
- Health Services Union
- Industrial Staff Union
- Maritime Union of Australia
- Media, Entertainment and Arts Alliance
- Rail, Tram and Bus Union

⁹ Australian Labor Party (NSW Branch) Rules 2023 - https://assets.nationbuilder.com/nswlabor/pages/820/attachments/original/1689811363/ALP_Rules_Book_2_023.pdf?1689811363 accessed on 28/08/23.

- Shop, Distributive and Allied Employees Association, NSW Branch, Newcastle and Northern Branch
- Transport Workers Union
- United Services Union
- United Workers Union

By reference to publicly available information on its website, rule D.2 of the Labor Party¹⁰ states:

(a) The Administrative Committee consists of:

- 1. The Party Officers;*
- 2. 18 members elected by affiliated union delegates at Annual Conference;*
- 3. 18 members elected by all delegates who are not affiliated union delegates at Annual Conference;*
- 4. The State Parliamentary Leader and Federal Parliamentary Leader, or someone named to represent them, who must live in NSW and be a member of the Leader's Parliamentary Party.*

Affiliation Fees

Section 5 of the EF Act sets out the meaning of a political donation:

(1) For the purposes of this Act, a political donation is—

- (a) a gift made to or for the benefit of a party or a group of candidates, or*
- (b) a gift made to or for the benefit of an elected member, the whole or part of which was used or is intended to be used by the elected member—*
 - (i) solely or substantially for a purpose related to an election or to the elected member's duties as an elected member, or*
 - (ii) to enable the elected member to make, directly or indirectly, a political donation or to incur electoral expenditure, or*
 - (iii) to reimburse the elected member for making, directly or indirectly, a political donation or incurring electoral expenditure, or*
- (c) a gift made to or for the benefit of a candidate, the whole or part of which was used or is intended to be used by the candidate—*
 - (i) solely or substantially for a purpose related to an election, or*

¹⁰ Australian Labor Party (NSW Branch) Rules 2023 - https://assets.nationbuilder.com/nswlabor/pages/820/attachments/original/1689811363/ALP_Rules_Book_2_023.pdf?1689811363 accessed on 28/08/23.

(ii) to enable the candidate to make, directly or indirectly, a political donation or to incur electoral expenditure, or

(iii) to reimburse the candidate for making, directly or indirectly, a political donation or incurring electoral expenditure, or

(d) a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person—

(i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or

(ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.

...

(3) An annual or other subscription paid to a party by—

(a) a member of the party, or

(b) a person or entity (including an associated entity or industrial organisation) for affiliation with the party,

is taken to be a gift to the party for the purposes of this section.

Section 26 of the EF Act sets out the exemptions from donation caps:

(1) A party subscription paid to a party is to be disregarded for the purposes of this Division, except so much of the amount of the subscription as exceeds the relevant maximum subscription under subsection (8).

...

(7) A party subscription is—

(a) an annual or other subscription paid to the party by a member of the party, or

(b) an annual or other subscription paid to the party by an entity or other person (including an industrial organisation) for affiliation with the party.

(8) For the purposes of this section—

(a) the maximum subscription in respect of membership of a party is \$2,000, and

(b) the maximum subscription in respect of affiliation with a party is—

(i) if the amount of the subscription is not calculated by reference to the number of members of the affiliate—\$2,000, or

- (ii) *if the amount of the subscription is calculated by reference to the number of members of the affiliate—\$2,000 multiplied by the number of those members of the affiliate.*

By reference to publicly available information on its website, rule A.40 of the Labor Party¹¹ states:

- (a) *Unions pay affiliation fees each year in advance on their membership in the State as it is defined in the Rules and as decided from time to time by the Administrative Committee, subject to the authority of Annual Conference.
From 1 July 2010 the union affiliation fee shall be indexed annually by increases in the annual March quarter Sydney Consumer Price Index.
Unions shall be notified by 1 May in each year of the proposed change in the affiliation fee. A form on which to make this return is available from the NSW Party Office.*
- (b) *For the purposes of calculating union delegation sizes and affiliation fees, the number of members of each affiliated union must be determined each year by an independent audit by a registered auditor of:
 - (i) *The number of members eligible to vote in a ballot for an office in that union at 31 December as conducted by the Australian Electoral Commission or NSW Electoral Commission; and
The number of members identified in subsection (i) for whom the union received an amount of dues in relation to the period between 1 October and 31 December inclusive for that year.**
- (c) *Each affiliated union must by 4pm on the last Friday in February each year provide to the General Secretary in a sealed envelope:
 - (i) *the independent audit report for the previous year; and*
 - (ii) *advice on the number of members that union will affiliate on for the current year (which must be equal to or less than the number of members determined by the independent audit for the previous year);*
 - (iii) *and all such sealed envelopes must be opened at the same time in the presence of scrutineers appointed by affiliated unions.**
- (d) *Union delegation sizes must be based on the three year rolling average of that union's affiliation for the current and two preceding years.*
- (e) *Affiliation fees will be payable on a financial year basis.*
- (f) *In the event of an affiliated union being six months in arrears in its affiliation fees to the Party, the Administrative Committee may decide that such affiliated union shall not be*

¹¹ Australian Labor Party (NSW Branch) Rules 2023, Schedule B - https://assets.nationbuilder.com/nswlabor/pages/820/attachments/original/1689811363/ALP_Rules_Book_2_023.pdf?1689811363 accessed on 28/08/23.

entitled to be represented at any Annual Conference or Special Meeting of Annual Conference, until such arrears are paid.

A review of the publicly available information on its website, in its disclosure to the NSW Electoral Commission for the period 1 July 2021 to 30 June 2022 (the last full financial year currently available), the NSW Labor Party disclosed approximately **\$1,825,560.10** in gifts it had received for administrative purposes from affiliated trade unions.

No other registered political party represented by Members of this Committee - and I would hazard a guess, any other registered political party in NSW - receive affiliation fees, let alone on this scale.

Note this figure does not include gifts for state campaign purposes.

Reportable Political Donations

In addition to the aforementioned affiliation fees, the following trade unions made reportable political donations to the Labor Party during the period 1 July 2021 to 30 June 2022 (the last full financial year currently available):

Trade Union	Amount
Australian Municipal, Administrative, Clerical and Services Union, New South Wales and ACT (Services) Branch	\$5,000.00
Automotive Food Metals Engineering Printing Kindred Union	\$6,380.00
Finance Sector Union of Australia	\$500.00
Maritime Union of Australia	\$5,000.00
New South Wales Local Government Clerical Administrative Energy Airline & Utilities Union t/as United Services Union	\$6,700.00
Rail Tram & Bus Union - National office	\$6,700.00
Shop Assistants & Warehouse Employees Federation of Australia Newcastle & Northern New South Wales	\$6,700.00
Shop Distributive & Allied Employees Association	\$5,000.00
United Workers Union	\$6,700.00
TOTAL	\$48,680.00

Third-party Campaigners

In section 4 of the EF Act, a third-party campaigner is defined to mean the following:

- (a) for a State election—a person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a State election during a capped State expenditure period that exceeds \$2,000 in total,*
- (b) for a local government election—a person or another entity (not being an associated entity, party, elected member, group or candidate) who incurs electoral expenditure for a local government election during a capped local government expenditure period that exceeds \$2,000 in total,*
- (c) a registered third-party campaigner for an election for which it is registered.*

Section 29(10) of the EF Act states that the applicable cap for a third-party campaigner at a State general election is:

(a) \$1,288,500—if the third-party campaigner was registered under this Act before the commencement of the capped State expenditure period for the election, or

(b) \$644,300—in other cases.

Under the EF Act, as distinct from the previous EFED Act, the expenditure cap extends beyond the old limited cap on only communications, to cover expenditure on whole-of-campaign infrastructure.

This is an important point when considering the proportionality of caps that are applicable to candidates, regardless of whether they are representing registered political parties or independent, and third-party campaigners.

Candidates need to put in place whole-of-campaign infrastructure, which may include but is not limited to office space, polling/research, general administrative expenses, telephone canvassing, robo-calls, motor vehicles, A-frames, signs, bunting or wrap, booth kits, instruction manuals for campaign workers, postage to electors (now over \$1 per item), digital and social media advertising, the organisation and distribution of how-to-vote cards, volunteer coordination and deployment at all pre-poll and polling centres, and the organisation of postal voting applications.

While third-party campaigners may also incur expenditure on some or all of the aforementioned items, it has been our experience that third-party campaigners tend to focus their expenditure where it will have maximum impact, such as the whole or part of a marginal seat or seats, or in certain regions. They often have in place existing organisational structures they can draw on and in the case of trade unions (affiliated or not), they supplement the voluntary effort of rank-and-file Labor Party members.

Regardless of whether they represent a registered political party or not, candidates are central to the electoral process. Voters must choose which candidate or candidates represent them in the Legislative Assembly and Legislative Council as the case may be. It is a candidate that appears on the ballot paper.

In guidance on its website¹², the NSW Electoral Commission states that the following attributes distinguish third-party campaigners from political parties:

- a third-party campaigner requires a less-defined structure than that needed by a party
- a third-party campaigner will have one main issue or community segment of concern
- there is no requirement for identifiable members as there is for a political party
- there is no requirement for public acceptance by any candidate of endorsement by the organisation as their representative (if elected) in Parliament or on a council.

Without seeking to diminish their implied right of political communication, which has consistently been upheld by the High Court, they are not running for public office.

¹² NSW Electoral Commission, Third-party campaigners – <https://elections.nsw.gov.au/political-participants/third-party-campaigners> accessed on 28/08/2023.

The significant uplift proposed in section 29(12) will, if implemented, have a dramatic impact on the electoral outcomes of individual seats in a general election. The additional cap, as part of the overall cap of a third party campaigner, can be directed at electorate-specific expenditure. Without accompanying acting in concert provisions, affiliated trade unions can coordinate their efforts and direct their additional caps in a targeted manner to those marginal seats where the Liberal or National parties, minor parties or independents may hold seats or have a slight electoral advantage.

If this amendment in the Bill is to be adopted, there will be a greater impact concentrated in fewer seats. An analysis of the 75 electoral districts contested by the Liberal Party at the 2023 State election showed that 11 electoral districts had just 4 candidates nominate, and a further 24 electoral districts had just 5 candidates nominate. If the proposed caps on third party campaigners were to have been in place in these electoral districts at the last election, third party campaigners would have had a disproportionate ability to sway voters in the electoral districts that determined the outcome of the election.

The following case studies provide some recent examples of the impact of third party campaigners under previous and current legislative arrangements.

Case Study 1 – 2017 By-elections in Gosford, Manly and North Shore

On 19 January 2017, the Hon Mike Baird MP announced his resignation as Premier of New South Wales and his intention to retire as the Member for Manly. On 27 January 2017, the Hon Jillian Skinner MP announced her intention to retire as the Member for North Shore. On 14 February 2017, Kathy Smith MP announced her intention to retire as the Member for Gosford, due to ill-health.

On 3 March 2017, the Speaker of the Legislative Assembly, the Hon Shelley Hancock MP, announced that by-elections in the three vacant seats would take place on Saturday 8 April 2017.

The by-elections were conducted under the *Election Funding, Expenditure and Disclosures Act 1981* ('EFED Act'). Under the EFED Act and the EF Act, which is now in force, registered political parties must abide by strict caps on campaign expenditure. In a by-election, the expenditure cap for candidates nominated by political parties during the regulated period (from the issue of the writs to polling day) is \$245,600 per seat. In addition, third-party campaigners could register and at that time, spend up to \$24,700 per seat (an amount that is about one tenth of the applicable cap that is proposed for third-party campaigners at by-elections in the Bill that is the subject of this inquiry).

In the case of the Gosford by-election - the only one of the three by-elections contested by the Labor Party - 6 third-party campaigners registered, all of which were trade unions:

- Australian Education Union NSW, Teachers Federation
- NSW Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union
- NSW Nurses & Midwives Association
- Unions NSW

- Electrical Trade Union of Australia, NSW
- RTBU Rail, Trams, Bus Union – NSW

In addition to the Labor and Liberal Party's expenditure caps of \$245,600, each of these six trade unions were able to spend a total of up to \$148,200.

Therefore, the combined lawful expenditure that could be spent by Labor/trade unions was up to \$393,800, compared to the lawful expenditure that could be spent by the Liberal Party, which was up to \$245,600. That is, the Liberal Party's lawful expenditure was only 62.37 per cent of the combined Labor/trade union expenditure, with the applicable third-party campaigner cap set at only about one tenth of the proposal in this Bill.

These trade unions campaigned against the Liberal Party citing a number of public issues. Campaign materials distributed and displayed by these third-party campaigners on Election Day urged voters to 'put the Liberals last'.

The Labor candidate Leisl Tesch won the seat, achieving a swing to Labor of 10.9 per cent.

Case Study 2 – 2022 By-elections in Bega, Monaro, Strathfield and Willoughby

On 1 October 2021, the Hon Gladys Berejiklian MP announced her resignation as Premier of New South Wales and her intention to retire as the Member for Willoughby. On 3 October 2021, the Hon Andrew Constance MP announced his intention to retire as the Member for Bega. On 4 October 2021, John Barilaro MP announced his intention to retire as the Member for Monaro. On 17 October 2021, Jodi McKay MP announced her intention to retire as the Member for Strathfield.

On 21 January 2022, the Speaker of the Legislative Assembly, the Hon Jonathan O'Dea MP, announced that by-elections in the four vacant seats would take place on Saturday 12 February 2022.

The Liberal Party contested the by-elections that were held in the Districts of Bega, Strathfield and Willoughby. The National Party contested the District of Monaro.

In the District of Bega, 8 third-party campaigners registered, 6 of which were trade unions:

- New South Wales Local Government Clerical Administrative Energy Airlines & Utilities Union
- Unions NSW
- Australian Nursing and Midwifery Federation NSW Branch
- Australian Education Union NSW Teachers Federation
- NSW Nurses and Midwives' Association
- Fire Brigade Employees' Union
- Far South Coast Environment and Heritage Conservation Incorporated

- Taxi Owners Small Business Association Incorporated

It should be noted that the two non-union third-party campaigners were not conducting campaigns that in any way supported the Liberal Party's candidate.

In the District of Monaro, 6 third-party campaigners registered, all of which were trade unions:

- New South Wales Local Government Clerical Administrative Energy Airlines & Utilities Union
- Unions NSW
- Australian Nursing and Midwifery Federation NSW Branch
- Australian Education Union NSW Teachers Federation
- NSW Nurses and Midwives' Association
- Fire Brigade Employees' Union

In the District of Strathfield, 6 third-party campaigners registered, all of which were trade unions:

- New South Wales Local Government Clerical Administrative Energy Airlines & Utilities Union
- Unions NSW
- Australian Nursing and Midwifery Federation NSW Branch
- Australian Education Union NSW Teachers Federation
- NSW Nurses and Midwives' Association
- Fire Brigade Employees' Union

In the District of Willoughby, 5 third-party campaigners registered, all of which were trade unions:

- New South Wales Local Government Clerical Administrative Energy Airlines & Utilities Union
- Australian Nursing and Midwifery Federation NSW Branch
- Australian Education Union NSW Teachers Federation
- NSW Nurses and Midwives' Association
- Fire Brigade Employees' Union

In addition to Labor and the Liberal Party's expenditure caps of \$245,600, each of the aforementioned trade unions were able to spend a combined:

- \$129,000 in each of Bega, Monaro and Strathfield

- \$108,000 in Willoughby

Therefore, the combined lawful expenditure that could be spent by Labor/trade unions in each of Bega, Monaro and Strathfield was up to \$374,600 compared to the lawful expenditure that could be spent by the Liberal Party, which was up to \$245,600. That is, the Liberal Party's lawful expenditure was only up to 65.40 per cent of the combined Labor/trade union expenditure with the applicable third-party cap set at only about one tenth of the proposal in this Bill.

These trade unions campaigned against the Liberal and National Parties citing a number of public issues. Campaign materials distributed and displayed by these third-party campaigners on Election Day urged voters to 'Send him/Dom a message'. Labor's tag-line in the seats it contested was 'Make him/Dom listen'.

- The Labor candidate in Bega, Dr Michael Holland, won the seat, achieving a swing to Labor of 12.0 per cent.
- The Labor candidate in Strathfield, Jason Yat Sen Li, won the seat, achieving a swing to Labor of 0.8 per cent.
- The Liberal candidate in Willoughby, Tim James, won the seat but suffered a swing to an independent of 17.7 per cent.
- The Nationals candidate in Monaro, Nicholle Overall, won the seat but suffered a swing to Labor of 6.4 per cent

Case Study 3 - 2023 NSW State Election

By reference to publicly available information on its website, according the State Register of Third-party Campaigners¹³, maintained by the NSW Electoral Commission, 26 trade unions registered as TPCs for the 2023 NSW State General Election:

- Australian Education Union NSW Teachers Federation
- Australian Municipal, Administrative, Clerical and Services Union, New South Wales and ACT (Services) Branch
- Australian Nursing and Midwifery Federation NSW Branch
- Australian Paramedics Association (NSW)
- Australian Rail Tram and Bus Industry Union New South Wales Branch
- Australian Salaried Medical Officers' Federation NSW
- Australian Workers Union - National Office

¹³ State Register of Third-Party Campaigners, NSW Electoral Commission: <https://elections.nsw.gov.au/NSWEC/media/NSWEC/Registers/Register%20of%20Third%20Party%20Campaigners/20230321-SGE-Register-of-Third-Party-Campaigners.pdf> accessed on 28/08/23.

- Automotive Food Metals Engineering Printing Kindred Union
- CEPU of Australia (Plumbing Division)
- CFMEU Manufacturing Division
- CFMEU Northern Mining & NSW Energy District
- CFMMEU Construction & General Division, NSW Divisional Branch
- Electrical Trades Union of Australia NSW Branch
- Fire Brigade Employees' Union
- Health Services Union NSW
- Newcastle Trades Hall Council
- New South Wales Local Government Clerical Administrative Energy Airline & Utilities Union t/as United Services Union
- NSW Nurses and Midwives' Association
- Police Association of NSW
- Public Service Association of NSW
- Shop Assistants & Warehouse Employees Federation of Australia Newcastle & Northern New South Wales
- Shop Distributive & Allied Employees Association
- The Association of Professional Engineers, Scientists And Managers Australia, NSW Branch
- The Australian Workers Union NSW Branch
- Unions NSW
- United Workers Union

Of the 26 trade unions listed above:

- 17 trade unions registered before the capped expenditure period commenced on 1 October 2022.
- 8 trade unions are affiliated to the NSW Labor Party, and
- One of those trade unions registered three of its branches/divisions.

These 26 trade unions were entitled to lawfully spend up to \$27.7 million in electoral expenditure at the 2023 State election. By contrast, the maximum a registered political party contesting every electoral district could lawfully spend was \$24.6 million.

The 8 affiliated trade unions were able to incur up to \$10.3 million in electoral expenditure, in addition to the affiliation fees they paid to the Labor Party over the capped expenditure period (and, indeed, over the electoral cycle) and any reportable political donations they may have made.

In addition to the 26 unions, a further 7 third-party campaigners were registered by 30 September 2022:

- No CSG in Barwon - Put the Nats Last Pty Ltd (Anyone but Nats)
- NSW Minerals Council Ltd
- The Registered Clubs Association of New South Wales (T/A ClubsNSW)
- Local Government and Shires Association of NSW
- NSW Business Chamber Limited
- Pharmacy Guild Of Australia NSW Branch
- Sydney Alliance for Community Building Ltd

It should be noted that of these 7 other third-party campaigners, none are affiliated with the NSW Liberal Party.

During the course of the 2023 election campaign, Labor supported by third party campaigners ran a campaign which falsely claimed that the Perrottet Government would privatise the State's water assets. Irrespective of the truth or otherwise of their campaign, third party campaigners coordinated their message, deploying volunteers and distributing collateral containing their message. Examples are set out in an Annexure A of this submission.

The 2023 State election saw a change of government, with a 3.7 per cent primary vote swing to the Labor Party and a 5.2 per cent swing against the Liberal Party. On a two-party preferred basis, there was a 6.3 per cent swing to the Labor Party.

The Labor Party won 45 electoral districts, a gain of 7 seats on their 2019 result, while the Liberal and National parties won 36 electoral districts, which was a loss of 10 seats.

Given the scare campaign run by Labor and trade unions on Sydney Water, the loss of 10 electoral districts can be attributed in no small part to this coordinated effort to damage the former Premier and erode the primary votes of the Liberal and National Parties.

Recommendations

It is the Liberal Party's strong view that the EF Act requires a significant overhaul to address these inequities.

Currently, the EF Act allows the Labor Party to have its cake and eat it too.

Trade unions that choose to affiliate with the Labor Party - paying it significant fees each year (which can be used for administrative purposes) for the privilege of attaining rights to vote at its Annual

Conference, to be represented on its Administrative Committee, and to influence its policy direction - are, arguably, not third parties at all.

In every respect, affiliated trade unions are part of the Labor Party, and their participation is codified within their Party's rules. That is their right and their choice.

However, in making that choice, they should not then be permitted to also register as third-party campaigners, nor should they be able make political donations.

We submit the following recommendations for the Committee's consideration:

1. That third party campaigners should be limited to a cap of no more than 15 per cent of a cap applicable to a candidate, consistent with the previous Act.
2. That organisations that choose to affiliate with a registered political party should not be permitted to register as third party campaigners.
3. That organisations that choose to make political donations to a registered political party should not be permitted to register as third party campaigners for a period of four years.
4. That different branches or divisions of the same organisation should not be able to register separately as third party campaigners in the same way that related bodies corporate are treated for the purposes of aggregating reportable political donations.
5. That third party campaigners should have to register if they incur any expenditure during the regulated period (noting that currently, the threshold for registration of a third party campaigner is that they have incurred at least \$2,000 in electoral expenditure).

Conclusion

The Bill in its current form will substantially interfere with the existing proportionality of the applicable caps on lawful electoral expenditure between third-party campaigners, when compared to registered political parties.

Given the strong interdependent relationship between the Labor Party and trade unions, this will further entrench the inequity that already exists in the lawful expenditure that can be spent in support of Labor candidates over what can be spent in support of Liberal candidates, or any other opponents running against Labor candidates. For example, in seats held by The Greens or Labor-held inner city seats, the major political contest is between the Labor candidate and third-party campaigns run by trade unions on one side and The Greens' candidate on the other side.

As a consequence, because the non-Labor/union supported candidate will lawfully be able to spend less money on their campaign relative to the money spent by their Labor opponent, this will impose a significant, unconstitutional limitation upon the freedom of their political expression.

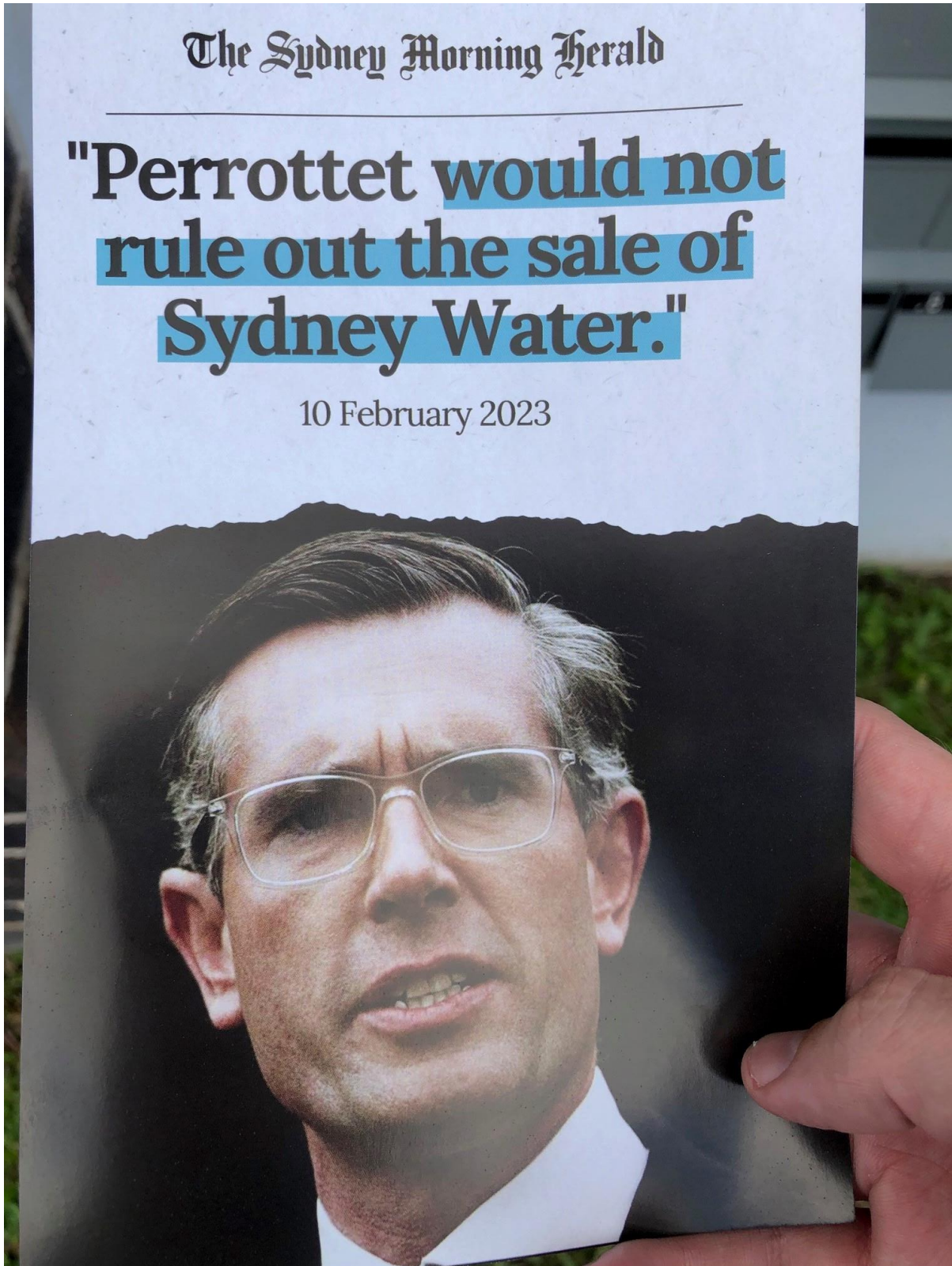
In this submission we make a number of recommendations and suggestions to recalibrate and equalise the contest, which better align with constitutional protections of the freedom of political expression.

No compelling justification has, to date, been put forward by the JSCEM or the Minns Government for the dramatic changes that are proposed in this Bill. Indeed, this Bill will only make an already uneven playing field worse.

I trust this information assists the Committee.

Yours sincerely

Chris Stone
State Director



Labor Party flyer, 2023 State election

Sydney
WATER

FOR SALE?

After 12 years in office, Dominic Perrottet and the Liberals have made cost of living pressures worse by selling our electricity network and motorways to private companies.

Now Dominic Perrottet has refused to rule out selling Sydney Water and other essential state-owned assets.

Source: Sydney Morning Herald, 10 February 2023

After 12 years, Perrottet and the Liberals just don't get it.

Authorised by Bob Nanva, Australian Labor Party (NSW Branch), 9/377 Sussex Street, Sydney NSW 2000.

Labor Party flyer, 2023 State election



Unions NSW and Public Service Association campaigning, 2023 State election.



Your water rates will
go up by \$264 per year
if the Liberals privatise
Sydney Water

*Source: The Australia Institute Centre for
Future Work Report, March 9, 2023*

At this state election,
**DON'T RISK
THE LIBERALS.**

*Authorised by Angus McFarland, Australian Services Union NSW & ACT,
39-47 Renwick Street, Redfern NSW 2016*

Australian Services Union NSW & ACT social media advertising, 2023 State election.