2018 Unions NSW Briefing Note:
NSW Electoral Funding Bill

Halving The Expenditure Cap For Third Party Campaigners

section 29(10) of Electoral Funding Bill

The Bill halves the spending caps for third party campaigners from $1,050,000 to $500,000 for those who are registered before the election, and from $525,000 to $250,000 for those who are not registered before the election.

The second reading speech makes it clear that the rationale for this reduction in the caps is that whilst third party campaigners should have *"sufficient"* scope to run campaigns to influence voting at elections, this should not be to the same extent as parties or candidates who directly contest elections. **The Joint Standing Committee on Electoral Matters recommended that before the cap was decreased, the NSW government should consider whether there was sufficient evidence that a third-party campaigner could reasonably present its case within this expenditure limit. There is no evidence this research has been undertaken by the Government.**

Constitutional law expert Anne Twomey has stated that electoral legislation should be careful to ensure the voices of third party campaigners and others can be heard and are not muzzled by the legislation,[1] and that any caps on expenditure of third party campaigners must be such that they are reasonably able to present their case.[2]

No changes have been made to expenditure caps for political parties. The total cap for a party that endorses candidates in all 93 Assembly seats is $11.4 million.

Restrictions On Third-Party Campaigners Acting In Concert

sections 35 and 58(5) of Electoral Funding Bill

The Bill makes it unlawful for third party campaigners to 'act in concert' with other persons to incur electoral expenditure that exceeds the applicable cap.

The term 'person' is not defined but would include representatives of political parties, third party campaigners or any other organisation engaged in the election. **The definition of 'acts in concert' is broad and refers to a formal or informal agreement to campaign with the principal object of having a party or candidate elected, or opposing their election.**

This section of the Bill is new and untested. It is not clear what activities would be captured or how it would be enforced. No guidance on this is given, with the only commentary coming the Joint Standing Committee, noting that the Expert Panel considered this provision would *"prevent third-party campaigners with common interests from launching a coordinated campaign with a combined expenditure cap that would overwhelm parties, candidates and other third parties acting alone."*[3]

It is possible the following activities would be considered unlawful:

- Third party campaigners sharing the costs of airing joint television advertising related to the election.
- Third party campaigners publishing their logos together on campaign material.
- The sharing of research between third party campaigners.
- A third-party campaigner meeting with a political party to discuss the key issues and strategies of their separate election campaigns.

The provision is very similar to s205H of the Electoral Act 1992 (ACT), introduced in 2012 and repealed in

2015. The section was repealed after a Senate Select Committee was established in 2014 on Amendments to the Electoral Act 1992, looking at various matters including the impact of the High Court decision in *Unions NSW & Ors v NSW* [2013] HCA 58 on the Electoral Act. The ACT government, while acknowledging there were conflicting views about this matter, decided to repeal s205H in light of the High Court case, to avoid any uncertainty about its validity.

If a third-party campaigner exceeds the spending cap by acting in concert with another 'person' the third party campaigner must pay back double the amount exceeded to the State Government. The Bill does not specify how the payment would work if two third parties acted in concert with each other.

Expanded Definition Of Electoral Expenditure

section 7 of Electoral Funding Bill

Under the current Act, only electoral communication expenditure is counted towards the expenditure cap and the Act provides an exhaustive list of what this includes. Under the Bill, *'electoral communication expenditure'* is deleted, expanding the expenditure caps to include all electoral expenditure and **the Bill provides an inclusive list of the kinds of expenditure captured.** This could potentially broaden the types of expenses included in the overall expenditure cap.

Inclusion Of Associated Entity

sections 4, 12(1), 30(4), Division 3

Associated entities have been introduced into the Bill (they do not feature in the current Act) and are defined as *"a corporation or another entity that operates solely for the benefit of one or more registered parties or elected members."* **This definition is different to the definition recommended by the Joint Standing Committee.**[4]

The Bill extends provisions relating to disclosure and electoral expenditure to associated entities and gives associated entities the same detailed disclosure requirements as political parties. For the purposes of the expenditure cap, the electoral expenditure of associated entities is to be aggregated with the relevant political party and elected members. Associated entities would also have to register with the Electoral Commission.

It is believed the intention of the provisions regarding *'associated entities'* is to restrict political parties from setting up front organisations to avoid spending caps and detailed disclosure obligations. While the definition of associated entity is fairly narrow, there is cause for concern with the introduction of this category and how it could be interpreted. A preferred definition would be *"an entity within the control of a political party or member."* This more confined definition would ensure the constitutional validity of such a provision (in light of *Unions NSW v NSW*), would not limit the political participation of third parties, and would properly target the mischief the Bill seeks to prevent, which is political parties setting up front organisations.

The recent *Federal Bill (Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017)* demonstrates why the definition of associated entity should be kept very narrow. The Federal Bill expands previous provisions regarding associated entities to cover potentially many more organisations, including special interest groups, unions or campaigning organisations. The Federal Bill provides that an entity is taken to operate wholly, or to a significant extent, for the benefit of one or more political parties if they or their officers make public or private statements that they operate for the benefit of a party or to the detriment of a party, or if the entity's expenditure is predominately political and is used to promote or oppose a political party.

1 Professor Anne Twomey, Transcript of evidence to the Select Committee on Amendments1992 to the Electoral Act, 16 May 2014, p. 42

2 Inquiry into The Final Report of the Expert Panel – Political Donations and the Government's Response / Joint Standing Committee on Electoral Matters, June 2016, paragraph 7.19, page 48.

3 Inquiry into The Final Report of the Expert Panel – Political Donations and the Government's Response / Joint Standing Committee on Electoral Matters, June 2016, paragraph 7.26 page 50.

4 That definition included two parts: *"entities that are controlled by a political party or that operate solely for the benefit of a political party"* Inquiry into The Final Report of the Expert Panel – Political Donations and the Government's Response / Joint Standing Committee on Electoral Matters, June 2016, paragraph 6.59, page 44.