



Joint Standing Committee on Electoral Matters

Inquiry into the Administration of the 2019 State Election and Related Matters



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Foreword

The Public Service Association of NSW is a state-registered employee organisation representing almost 40,000 members, 80% of whom are employed by the NSW Government and 20% employed by state owned corporations, universities, TAFE and NGOs. Established in 1899, the PSA has a long and proud history of acting on behalf of its members in all aspects of their working lives, providing support, expert advice and individual as well as collective representation.

As a union for NSW public servants and employees of organisations largely funded by the state through its budget, the decisions and actions of the State Government directly impact members of the Association, and the services they provide. It is therefore the duty of the Association to take an active role in political debates, particularly during election periods. It is the position of the Association that the ability to campaign effectively for the interests of members was inhibited by the *Electoral Funding Act 2018*.

The following submission will provide a brief outline of the campaign run by the Association, including the obstacles and barriers faced due to the restrictions on third party campaigners contained within the *Electoral Funding Act 2018*.

The Association thanks the Committee for its work and welcomes the opportunity to contribute to this important electoral process.

The Campaign

The Public Service Association was a registered third party campaigner in the 2019 State Election and ran a prominent campaign with the tagline: '*What shape would NSW be in without our public services?*' The Association also ran a concurrent campaign focusing solely on vocational education, with the tagline, '*Rebuild our TAFE*'.

In developing the campaign, the Association surveyed its membership in order to gauge which issues were important to them. From the gathered data, some of the key issues the Association campaigned around included:

- ❖ Stopping the privatisation of public services, including Corrective Services, rebuilding TAFE and reinstating a public safety net for disability services.
- ❖ The end of Benchmarking in Corrective Services
- ❖ Fairer pay and conditions for NSW public servants, including for the scrapping of 2.5% wage cap.
- ❖ Insecure work in the public sector such as casualisation, and labour hire to halt.
- ❖ The scrapping of the 12% (over four years) efficiency dividend.
- ❖ Improved access to workplace flexibility.
- ❖ A fairer workplace system to keep the employer in check.

Electoral Funding Act 2018

In May 2018, the NSW Government introduced the *Electoral Funding Act 2018* which contained certain provisions which were ultimately rejected or nullified by the High Court in *Unions NSW v New South Wales [No2]* in January 2019.

The contested provisions included Section 29(10), which reduced the monetary limit of electoral expenditure by third-party campaigners from over \$1.2 million to \$500,000 in the six months leading up to a State election and Section 35(1) which prohibits a third-party campaigner from acting in concert with another person to incur electoral expenditure during the capped expenditure period in excess of the applicable cap.

The State Government claimed that these provisions would help "to guard against third parties coming to dominate election campaigns,"¹ however it is the position of the Association that this was in actual fact an attempt to suppress and "drown out" other (mainly union and workers) voices.

As the High Court found in *Unions NSW v New South Wales [No 1]* 2013, freedom of political communication was,

*"not simply a two-way affair between electors and government or candidates".
There are those in the community who are not electors but are affected by
government decisions and have a legitimate interest in governmental action and the
direction of policy."*²

It is fundamental that as a union – particularly a union for public sector workers - the Association be able to campaign against governments that have made decisions that are not in the interests of the public or the workers who work for the government.

As government employees, members of the Association are not just affected by election campaigns: government actions and decisions affect these members on a daily basis. This means that election issues and workplace issues can be near impossible to differentiate for these members. Combining this fact with the imposed \$500k spending cap presented a unique challenge for the Association during the 2019 Election because it was often very difficult to separate what work constituted day-to-day workplace activities as opposed to election campaigning activities.

For example, if a member in Corrective Services is facing the possibility of their gaol (place of employment) being privatised, this issue does not begin and end with an election campaign but

¹ Panel of Experts, Final Report, pp 108-109. The rise of third-party advertising is examined by Orr G and Gauja A, "Third-Party Campaigning and Issue-Advertising in Australia" (2014) 60(1) Australian Journal of Politics and History 8.

² <https://www.parliament.nsw.gov.au/researchpapers/Documents/HighCourtE-Brief.pdf>

would also be part of a typical workplace campaign run by the Association as part of its day-to-day activities.

Furthermore, the fact that the 2019 State Election also took place very close to a Federal Election – while the timing was out of the control of the NSW Government – further convoluted the situation, given that one campaign had a cap and the other didn't and the Association has members under both the state and national systems so was campaigning across both elections.

Although parts of the Act were rendered inoperable before the election on 23 March 2019, the Association needed to plan its electoral spending long before the decision of the High Court was brought down. As such, the planning was based on the legislation as it was originally passed.

Section 29(10): Expenditure cap for third-party campaigners

The \$500,000 limit imposed on the Association was an immediate impediment. Pre-election planning showed that the best chance of having members of the Association's issues become important to voters, and therefore have an impact on the political parties' policies, was to target key country based electorates with focused campaigns, while running a state wide overarching campaign. However, it became clear that the cap would stop any overarching campaign from being run state wide through the expenditure limit compounded by the increase in cost of advertising during an election period.

At the same time, a grassroots campaign based on specific regional areas or seats would have required significant costs which would have required the Association to either focus on one or two seats (reducing the ability to influence parties as a whole) or have run numerous campaigns which would be starved of resources, creating minimum impact.

This was further exacerbated by s 29(12) 'Additional cap for individual Assembly seats' of the Act. This prevented the Association from being able to target particular seats or Government Ministers around decisions made during the last term of Government.

Although the Association did run our overarching campaign state wide, there was a clear focus on containing costs. The campaign ran for a limited period of time on electronic media (television, cinema and radio) with a greater focus on physical billboards and digital targeting in regional areas.

Cut through in the metropolitan areas was severely limited as a result, while our feedback from the regions was that voters knew our message but not the details of what it meant for them locally.

It was clear that the Association's ability to represent its members, who are based NSW-wide and whose work impacts every electorate in the state, was severely compromised by the expenditure limit.

Section 35: Acting in concert

Working people are well aware that not all individuals have the financial, social or political capital to affect change on their own. This is why unions and their members have historically pooled their resources to run campaigns collectively.

Public sector workers are covered by a variety of unions which means issues are shared. The *Rebuild Our TAFE* campaign had less affect than it may have done had the Association had been able to speak to the Australian Education Union (AEU) and coordinate issues of mutual concern.

Similarly, issues such as Workers' Compensation changes the Association is seeking in NSW affect all workers in NSW and this provision would impede any coordination across groups on this issue.

The long term outcome would be a drive towards establishment support for single issue minor and micro parties on issues such as Workers' Compensation. However, the history of political legislation in this state shows that discouraging such groups has been a focus of all government legislation since the notorious 'tablecloth' ballot paper at the 1999 state election.

The fact that the High Court did not make a firm ruling on the validity of s 35 is concerning. The PSA strongly urges that the acting in concert provision remains out of any future electoral legislation.

Conclusion

During the 2019 State Election the Public Service Association of NSW was registered with the Election Funding Authority as a third party campaigner. The Association complied with all requirements under the *Election Funding, Expenditure and Disclosures Act 1981* and the *Electoral Act 1912* (NSW).

As this submission has demonstrated, provisions s 29(10) and s (35) of the *Electoral Funding Act 2018* significantly inhibited the Association's ability to campaign effectively for the interests of its members. These constraints were of particular concern for members of the Association because they are frontline public servants, directly employed by the NSW Government and therefore directly impacted by election results.

The Association believes that the cap of \$500 thousand imposed by s 29(10) was not enough money to run an effective campaign, particularly given the diversity of the Associations membership and the fact that members are spread across all metropolitan and regional areas of NSW.

The Association urges the Committee to do everything with its power to ensure that neither these provisions nor similar ones be enacted into any future electoral legislation.

Unions give voice to the workers of NSW, and those workers deserves freedom of political communication.

As the NSW Parliamentary Research Service observed,

The High Court’s decision in Unions NSW v New South Wales suggests that the court will continue to scrutinise “with scrupulous care” any legislation that is challenged on the basis of contravening the implied freedom of political communication under the Constitution.³

³ <https://www.parliament.nsw.gov.au/researchpapers/Documents/HighCourtE-Brief.pdf>