

# Spending caps: vital reform for achieving a fairer democracy

The Human Rights Law Centre, the Australian Conservation Foundation and the Uniting Church in Australia, Synod of Victoria and Tasmania, together with the 9 other civil society organisations listed below, urge the Joint Standing Committee on Electoral Matters (**Committee**) to recommend that caps be imposed on the amount of money candidates, political parties, political campaigners and third parties can spend in the lead up to and during Federal elections (**spending caps**). Spending caps are necessary to:

1. **Restore democracy:** Without spending caps, our election debates are dominated by those with the biggest bank balance, not those with the best ideas. By reining this spending in, we can hope to restore Australians' trust in democracy.
2. **Restore equality:** Spending caps are essential to realising a foundational principle of the Commonwealth Constitution: that Australians enjoy an equal share of political power.
3. **Focus on national interest:** Spending caps allow politicians to focus on governing the country, rather than on building ever larger war-chests.

## Background

### Australia cannot afford to do nothing

Australians' satisfaction with democracy is in freefall: according to an extensive 2018 survey, satisfaction has declined since its highest point of 86% in 2007, to just 41% in 2018.<sup>i</sup>

There are multiple reasons for this decline in trust, but meaningful regulation of money in our political system is a vital and achievable first step to addressing it. The most popular reforms of all options put to survey respondents, with 73% support, were reforms that limit how much money can be spent in an election and donated to political parties.<sup>ii</sup>

### 2019 Federal election

Reports indicate that Clive Palmer spent \$60 million campaigning for his United Australia Party in the 2019 election.<sup>iii</sup> That is double the expenditure projected for both the Australian Labor Party and the Liberal Party combined, and 167 times that of the Greens.<sup>iv</sup>

Our constitution enshrines Australians' equal opportunity to participate in our representative democracy,<sup>v</sup> and yet currently billionaires can use vast sums of cash to buy a national platform that is well out of reach to the rest of us.

The impact of Palmer's spending on the election is contentious: he failed to win a single seat, but claims to have secured the Coalition Government's win with his preferences.<sup>vi</sup> Either way, without

spending caps we remain vulnerable to disproportionate political influence by those with the fattest wallets.

The status quo ensures that political inequality is the reality of our democratic system. If we're to achieve a fairer Australia, we need spending caps in elections.

## Spending caps are just one part of necessary reforms

Caps on spending during elections are only one among a list of reforms that Australia's democracy desperately needs. Other reforms include:

- Caps on donations to political parties, candidates and associated entities;
- Greater transparency around donations to political parties, candidates and associated entities, including more regular disclosure;
- Regulation of lobbying to achieve greater transparency around who is influencing decision-makers in Government and Parliament;
- Closing the revolving door between Parliament and businesses that lobby politicians; and
- A Federal integrity commission to ensure corruption and misconduct is appropriately and independently addressed.

All of the above reforms are critical, however given the extraordinary level of expenditure in the 2019 election, spending caps are the most pressing and immediately achievable reform; even as a stand-alone reform, they could have a significant impact.

Spending caps are more straight-forward than other reforms because they apply equally to all actors. This contrasts with donation caps which, if applied to third parties such as charities and industry groups which engage on election issues, can create an environment for unequal participation in elections. They hinder advocacy by charities and not-for-profits, which rely on donations, but do not affect industry groups and corporations which draw upon member fees and revenue.

For these reasons, we recommend that spending caps be the focus for reform in the first instance.

## The Australian Government is an outlier

The Federal Government's regulation of money in politics is extraordinarily weak when compared with other liberal democracies and many Australian States and Territories. Not only does the *Commonwealth Electoral Act 1918* (Cth) not cap political donations and spending, it only requires the bare minimum in terms of public disclosure of political donations and spending.

In contrast, two-thirds of European countries limit the amount a candidate can spend on an election campaign.<sup>vii</sup> Jurisdictions similar to Australia – the United Kingdom, Canada and New Zealand – all cap spending.

The Federal Government is increasingly lagging behind the States and Territories: New South Wales, South Australia,<sup>viii</sup> Tasmania and the ACT all have spending caps, and the Queensland Government is looking to reintroduce them.<sup>ix</sup>

**Two tables** in the **Appendix** set out the elements of spending caps at State and Territory level, as well as in comparative national jurisdictions.

## Constitutional considerations

The High Court has developed some useful jurisprudence that can guide the drafting of spending caps at Federal level. Some general principles are:

- (i) **Spending caps are not only constitutional, but benefit Australian democracy.**<sup>x</sup>
- (ii) **Spending caps should be set at the same level for political parties and third parties.**  
The High Court unanimously struck down a NSW law imposing a spending cap on third parties that was less than half of that of political parties in *Unions NSW v New South Wales* [2019] HCA 1.<sup>xi</sup>
- (iii) **Each entity should be subject to its own spending cap, unless that entity is controlled by or working closely with another entity on a campaign.** In *Unions NSW v New South Wales* [2013] HCA 58, the High Court struck down a NSW law that aggregated the expenditure of political parties with their “affiliated organisations” – in effect, requiring unions and the ALP to operate under the same spending cap – on the basis that affiliation to a political party under the legislation did not imply that they had the same political views.

### **Note on super-PACs in the United States:**

In *Citizens United v Federal Election Commission*, 558 US 310 (2010), the US Supreme Court found spending caps to be unconstitutional by virtue of the First Amendment, which guarantees individuals a right to free speech. In response to this decision, very wealthy corporations and individuals have pooled their funds together in “expenditure-only committees” – known colloquially as super-PACs – to campaign for politically-aligned candidates. Super-PACs are notorious for worsening political inequality in the US by opening the floodgates for billionaire third parties to spend unlimited amounts dominating the debate in elections. In Australia, the implied freedom of political expression operates very differently to the First Amendment and spending caps are constitutional. Spending caps are the best safeguard against replicating the US super-PAC system here.

## Best practice spending caps

### **Spending caps should aim to improve current levels of political equality**

This submission does not recommend a precise figure at which spending caps ought to be set, but instead sets out principles that should inform the introduction of best practice spending caps. First, the cap should not be set so high that it will only prevent another Palmer from far outspending everyone else, but should be at a level that will achieve a significant improvement in political equality. Specifically, the cap should be set lower than the current expenditure levels of the major parties, and take account of what the average Australian could conceivably raise to run as an independent candidate in a typical electorate.

### **Spending caps should apply to everyone equally**

Spending caps should be applied to all political actors, be they candidates, political parties or third parties such as companies, industry groups or not-for-profit entities, whenever their communications are for the dominant purpose of influencing votes in an election. Without imposing caps on third party spending, wealthy organisations and individuals could drown out political parties and candidates. However, on the flipside, third parties should not be subjected to a cap lower than that which applies to candidates and political parties: as discussed above, any such reform could be vulnerable to constitutional challenge.

### **Spending caps should not impose red tape on small players**

A spending cap will of course require political actors to track their spending to ensure accurate reporting and compliance. However such monitoring, while vital for big players, can impose a significant administrative burden on small organisations and discourage participation in elections at the grassroots level.

The requirement to monitor spending should, therefore, only apply when third parties anticipate spending over a sufficiently high threshold that will leave small-scale advocacy, for instance by volunteers wanting to host a meeting in their local electorate, unaffected. The flipside is that this threshold should not be so high as to incentivise political actors to avoid the spending caps by establishing multiple small organisations. Evidence as to the amount small grassroots campaigners typically incur may assist the Committee to determine the quantum for the cap.

### **The Committee should consider whether the current definition of “electoral matter” is appropriate to use to calculate a spending cap**

Currently, third parties must disclose expenditure incurred on “electoral matter” as defined by section 4AA of the *Commonwealth Electoral Act 1918* (Cth). This definition would likely be the basis on which to calculate a future spending cap, however it requires scrutiny as it is new, lengthy and complex.

Section 4AA defines “electoral matter” as matter communicated for the dominant purpose of influencing the way electors vote in an election, including promoting or opposing a political entity or a

sitting member of either House.<sup>xii</sup> This Committee should consider whether this new definition is appropriate as the basis for what is included in the spending cap.

### **Spending caps should not limit volunteers' ability to communicate with voters**

Non-monetary gifts, including the provision of free services, may be captured by spending caps by reference to their market value.<sup>xiii</sup> This is a reasonable measure to prevent people from circumventing the caps by seeking services for free.

However, spending caps should not capture volunteer labour of a non-commercial nature, for instance time spent door-knocking, making phone calls and community organising. These activities go to the heart of our democracy and candidates, political parties and third parties that can encourage such participation en masse should be able to do so unhindered.

### **Spending caps should apply at least two years from the last Federal election**

Limiting the period for which the spending cap applies alleviates the burden on political parties, candidates and third parties to track their expenditure throughout the entire Parliamentary term. However if the capped period is too short (e.g. from when the writs are issued), it can render the caps largely ineffective by incentivising actors to frontload their election expenditure.<sup>xiv</sup> In NSW, expenditure caps apply to campaign spending in the six months before an election, in the ACT the period is ten months. Anywhere between six months and a year would be a reasonable length of time.

However, at Federal level, we are unable to apply such a simple rule because we do not have fixed terms of government. A way of navigating this is for spending caps to apply from the date of the last election<sup>xv</sup> – e.g. two years from the last election, given that elections happen on average every two years and 7 months.<sup>xvi</sup>

### **Supporting organisations**

350 Australia

Australian Council of Social Service

Alliance for Gambling Reform

Combined Pensioners and Superannuants Association

Consumer Action Law Centre

Gun Control Australia

Oxfam Australia

Public Interest Advocacy Centre

Sunshine Coast Environment Council

## Appendix: Spending caps at state, territory and international level

### Spending caps at State and Territory level in Australia

State/Territory	Amount of spending cap	At what point before an election does the spending cap apply?	Cap includes volunteer time speaking to voters?
<b>New South Wales</b>	Up to ~ \$12m for political parties ~ \$140,000 for candidates <sup>xvii</sup>	Commences 1 October in the year before the election <sup>xviii</sup> (approx. 6 months).	No
<b>South Australia<sup>xix</sup></b>	Up to ~ \$3.5m for political parties ~ \$100,000-\$125,000 for candidates <sup>xx</sup>	Commences 1 July in the year before the election <sup>xxi</sup> (approx. 9 months).	No
<b>Tasmania (Legislative Council)</b>	Political parties are prohibited from incurring expenditure. <sup>xxii</sup> \$17,000 for candidates <sup>xxiii</sup>	Commences 1 January in the year before the election <sup>xxiv</sup> (approx. 5 months)	Not clear
<b>ACT</b>	Up to ~ \$1m for political parties \$40,000 for candidates <sup>xxv</sup>	Commences 1 January in the year before the election <sup>xxvi</sup> (approx. 10 months)	No

### Comparative liberal democracies

Country	Spending cap?	Includes third parties?	At what point before an election does the spending cap apply?	Cap includes volunteer time speaking to voters?
<b>United Kingdom</b>	Yes <sup>xxvii</sup>	Yes <sup>xxviii</sup>	For candidates: from the point at which a person becomes a candidate. <sup>xxix</sup> For parties: a year before the election. <sup>xxx</sup>	No
<b>New Zealand</b>	Yes <sup>xxxi</sup>	Yes <sup>xxxii</sup>	Approx. 3 months before an election. <sup>xxxiii</sup>	No

Canada	Yes <sup>xxxiv</sup>	Yes <sup>xxxv</sup>	Two separate capped periods apply: the pre-election period, approximately four months from election day; and during the election period, which is from when the writs are issued, at least 36 days from election day. <sup>xxxvi</sup>	Yes for third parties.
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<sup>i</sup> G Stoker, M Evans, M Halupka, "Trust and Democracy in Australia: Democratic decline and renewal", *Democracy 2025*, Report no. 1, December 2018, 1.

<sup>ii</sup> G Stoker, M Evans, M Halupka, "Trust and Democracy in Australia: Democratic decline and renewal", *Democracy 2025*, Report no. 1, December 2018, 43. In another study, 56 per cent of Australians thought the government was run for a "few big interests": S Cameron and I McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2016*, (2016) ANU, at 76.

<sup>iii</sup> We will not know the final figures on the expenditure that the political parties' incurred in the lead up to the election until the Australian Electoral Commission publishes parties' disclosures in February next year.

<sup>iv</sup> L Vitorovich, "Clive Palmer powers \$81.8 million election record" *The Australian*, 21 May 2019.

<sup>v</sup> *McCloy v New South Wales* [2015] HCA 34 at [45] (per French CJ, Kiefel, Bell and Keane JJ), citing *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578; and *Tajjour v New South Wales* (2014) 313 ALR 221 at 271.

<sup>vi</sup> B Smee, "Clive Palmer says he "decided to 'polarise the electorate' with anti-Labor ads to ensure Coalition win" *The Guardian*, 22 May 2019.

<sup>vii</sup> International Institute for Democracy and Electoral Assistance, "Are there limits on the amount a candidate can spend?" *Political Finance Database*, available at <https://www.idea.int/data-tools/data/political-finance-database> (accessed 22 May 2019).

<sup>viii</sup> A spending cap applies to candidates and political parties (not third parties) that opt-in to accept public funding: section 130Y *Electoral Act 1985* (SA).

<sup>ix</sup> F Caldwell, "Limit on election spending for state government campaigns not ruled out" *The Brisbane Times*, 6 March 2019, available at <https://www.brisbanetimes.com.au/politics/queensland/limit-on-election-spending-for-state-government-campaigns-not-ruled-out-20190306-p5123j.html> (accessed 1 September 2019).

<sup>x</sup> *Unions NSW v New South Wales* [2019] HCA 1 at [31] per (Kiefel CJ, Bell and Keane JJ).

<sup>xi</sup> The Court left open the potential for differentiation between the caps that apply to third parties and political parties where it is justified, however three Justices provided a particularly strong statement on the importance of third parties: "the requirement of ss 7 and 24 of the Constitution that the representatives be 'directly chosen by the people' in no way implies that a candidate in the political process occupies some privileged position in the competition to sway the people's vote simply by reason of the fact that he or she seeks to be elected": *Unions NSW v New South Wales* [2019] HCA 1 at [40] (per Kiefel CJ, Bell and Keane JJ).

<sup>xii</sup> It excludes communications for which the dominant purpose is to educate the public on an issue, or raise awareness of or encourage debate on a public policy issue.

<sup>xiii</sup> Section 47(3) *Electoral Funding Act 2018* (NSW).

<sup>xiv</sup> See criticism of Canada's spending caps for this very reason: H Jansen, "Political party financing in Canada" *The Canadian Encyclopaedia*, 14 December 2016, available at <https://www.thecanadianencyclopedia.ca/en/article/party-financing> (accessed 2 September 2019).

<sup>xv</sup> This recommendation follows that in J Tham, *Submission to NSW JSCEM's Inquiry into 2010 Federal Election*, Submission 90, 135.

<sup>xvi</sup> H Pickering, "Three-year parliamentary terms are woefully short" *Election Watch Australia*, University of Melbourne, 2016, available at <https://electionwatch.unimelb.edu.au/australia-2016/articles/Three-year-parliamentary-terms-are-woefully-short> (accessed 19 September 2019).

<sup>xvii</sup> Section 29 *Electoral Funding Act 2018* (NSW).

<sup>xviii</sup> Section 27 *Electoral Funding Act 2018* (NSW).

<sup>xix</sup> The spending cap in South Australia is opt-in for candidates and political parties (it does not apply to third parties) who wish to receive public funding: section 130Y *Electoral Act 1985* (SA).

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- <sup>xx</sup> Section 130Z *Electoral Act 1985* (SA).
- <sup>xxi</sup> Section 130A *Electoral Act 1985* (SA).
- <sup>xxii</sup> Section 162 *Electoral Act 2004* (Tas).
- <sup>xxiii</sup> Section 160 *Electoral Act 2004* (Tas).
- <sup>xxiv</sup> Section 3 *Electoral Act 2004* (Tas).
- <sup>xxv</sup> Sections 205D and 205E *Electoral Act 1992* (ACT), assuming a political party fields five candidates in each of the five electorates.
- <sup>xxvi</sup> Sections 198 *Electoral Act 1992* (ACT).
- <sup>xxvii</sup> *Representation of the People Act 1983* (UK) imposes spending caps on candidates; *Political Parties, Elections and Referendums Act 2000* (UK) imposes spending caps on political parties and third parties.
- <sup>xxviii</sup> Section 94 *Political Parties, Elections and Referendums Act 2000* (UK).
- <sup>xxix</sup> Section 118A *Representation of the People Act 1983* (UK).
- <sup>xxx</sup> Schedule 9 *Political Parties, Elections and Referendums Act 2000* (UK).
- <sup>xxxi</sup> Sections 205C and 206C of the *Electoral Act 1993* (NZ).
- <sup>xxxii</sup> Section 206V of the *Electoral Act 1993* (NZ).
- <sup>xxxiii</sup> Sections 205C and 206C of the *Electoral Act 1993* (NZ).
- <sup>xxxiv</sup> Section 430 of the *Canada Elections Act* (SC 2000, c.9).
- <sup>xxxv</sup> Sections 349.1 and 350 of the *Canada Elections Act* (SC 2000, c.9).
- <sup>xxxvi</sup> Section 2 of the *Canada Elections Act* (SC 2000, c.9). Third parties' spending is subject to an additional cap during the "pre-election period", which is roughly two months: sections 2 and 349.1 of the *Canada Elections Act* (SC 2000, c.9)