

# Explanation of the justification of the expenditure caps in the Electoral Amendment Bill 2020

## Part 1: Introduction

Under the Electoral Amendment Bill 2020 (WA), caps on electoral expenditure (expenditure caps) have been imposed on political parties, candidates, groups and other persons.

In *Unions NSW and ors v State of New South Wales* [2019] HCA 1 the High Court made it clear that any effective burden on the implied freedom of political communication must be justified even though Parliament does not generally need to provide evidence to prove the basis for legislation which it enacts (at [45]).

A law imposing an expenditure cap will be justified if it is reasonable and appropriate and adapted to meet a legitimate need and there are no other equally effective means available to the achieve those purposes or objects which impose a lesser burden on the implied freedom.

## Part 2: The setting of the expenditure caps

The expenditure caps have been set having regard to:

- (a) the need to produce a more level playing field;
- (b) previous reported electoral expenditure in past Western Australian elections; and
- (c) the need to adjust the cap amounts on a regular basis to offset the effects of inflation.

Consideration was given to expenditure caps imposed in other Australian jurisdictions. However, the electoral system in Western Australia is unique so it was not possible to ensure consistency with other jurisdictions in Australia which impose expenditure caps on electoral expenditure.

### (a) A more level playing field

There have been quite significant increases in total electoral expenditure in the last few years, which has been described as the "political arms race". This is illustrated in the following tables:

**Table 1: Total Reported Expenditure at 2013 and 2017 general elections**

Category	2013 General election expenditure	2017 General election total expenditure	\$ increase in total expenditure between each election
Political parties	\$8,822,894.68	\$11,325,220.55	\$2,502,325.87
Candidates (endorsed and independent)	\$794,041.48	\$863,014.57	\$68,973.09
Groups (see s.80 of the <i>Electoral Act 1907</i> (WA))	No returns in this category	\$73,035.65	N/A
Persons (other than political parties, candidates or groups)	\$1,395,751.35	\$7,057,476.17	\$5,661,724.67

**Table 2: Total Reported Expenditure at 2014 and 2018 by-elections**

Category	2014 Vasse by-election	2018 Cottesloe by-election	2018 Darling Ranges By-election
Political parties	\$189,924.79	\$67,071.55	\$496,193.65
Candidates (endorsed and independent)	\$3,500	\$17,587.08	\$6,909.66
Groups (see s.80 of the <i>Electoral Act 1907</i> (WA))	No returns in this category	No returns in this category	N/A
Persons (other than political parties, candidates or groups)	No returns in this category	No returns in this category	N/A

Political influence in Western Australia should not be proportionate to the greatest wealth. The expenditure caps which have been set in Western Australia are designed to:

*produce a more level playing field, limit the "political arms race" and prevent the "drowning out" of other voices. Unions NSW and ors v State of New South Wales [2019] HCA 1 at [18]*

Political influence will not be proportionate to the greatest wealth if:

- (a) there are not significant disparities between the lowest and highest amounts of electoral expenditure;
- (b) the highest spenders do not spend significantly more compared to all other spenders; and
- (c) measures are taken to ensure that those candidates who do not have the backing of a political party are not placed at a financial disadvantage when compared to those candidates who do have the backing of a political party.

The imposition of an expenditure cap will reduce the total amount of electoral expenditure and thus slow down the "political arms race".

Although the imposition of an expenditure cap restricts spending on electoral expenditure across the board, in practice it will only prevent spending by those at the highest end of the scale of spending. This is because those who spend the most on electoral expenditure often far exceed the average amount of electoral expenditure.

For example, in the 2017 general election, there were 19 organisations (other than a political party, candidate or group) who lodged electoral expenditure returns. Eighteen organisations spent less than \$1 million. The other organisation spent in excess of \$4.3 million. The average amount of electoral expenditure was \$371,446.11 and the lowest amount of electoral expenditure was \$241.67. This means that the biggest spender spent more than 17,000 times the smallest spender and more than 11 times the average spender. This disparity in spending clearly creates an un-level playing field. Had the proposed initial expenditure cap of \$2 million been in place at the last general election, only one organisation would have been precluded from spending what it did.

#### **(b) Previous reported electoral expenditure**

Expenditure caps have not previously been imposed in Western Australia so past reported electoral expenditure in this State provides the only useful guidance as to what might be a reasonable cap on expenditure.

Where information about past electoral expenditure is not available for a particular category, regard has been had to past reported electoral expenditure in a similar category.

The initial amount of each cap was designed to exceed previous reported electoral expenditure at the 2013 and 2017 general elections and by-elections held in 2014 and 2018. One of the reasons for this is that the proposed capped expenditure period (October to March) exceeds the length of the election period under the *Electoral Act 1907*(WA) (January to March).

The only exception is where the past highest electoral expenditure significantly exceeded the average electoral expenditure. Exclusion of past excessive expenditure is based upon its distance from the average expenditure rather than the political party, candidate, group or other person expending the funds. The imposition of an expenditure cap at a level below past excessive expenditure means that the highest spenders cannot spend significantly more compared to all other spenders and thus drown out the voices of those other spenders. It also means that there will not be the

same disparities between the lowest and highest amounts of electoral expenditure thus levelling out the playing field.

The initial expenditure caps will apply where polling day is before 1 July 2021. Thereafter, the expenditure cap will be an amount adjusted in accordance with inflation.

Information on past electoral expenditure has been sourced from the Electoral Commission website.

### **(c) Annual adjustment**

The expenditure caps will be adjusted each year in accordance with the Consumer Price Index to offset the effects of inflation. However, the adjusted amount will never be less than the original expenditure cap and, where necessary, amounts will be rounded up to the nearest whole number multiple of \$100.

## **Part 3: The proposed initial expenditure caps for political parties (proposed section 175SI)**

### **(a) Expenditure cap for political party at general election**

#### ***Proposed initial expenditure cap for political party at general election***

Conjoint election	\$125,000 x number of regions in which the party endorses 1 or more candidates in election + \$125,000 x number of districts in which the party endorses a candidate in the election
General election for Council (other than election held as part of conjoint election)	\$125,000 x number of regions in which the party endorses 1 or more candidates in election
General election for Assembly (other than election held as part of conjoint election)	\$125,000 x number of Assembly districts in which the party endorses a candidate in the election

#### ***Past reported electoral expenditure for political party at general election***

In the 2017 general election:

- There were 16 political parties which lodged election returns
- Total electoral expenditure for all parties was \$11,325,220.55
- The lowest amount of electoral expenditure of was \$394.15
- The highest amount of electoral expenditure was \$4,939,835.80
- The average amount of electoral expenditure was \$707,826.28

In the 2013 general election:

- There were 8 political parties which lodged election returns
- Total electoral expenditure for all parties was \$8,822,894.68

- The lowest amount of electoral expenditure of was \$1,792.76
- The highest amount of electoral expenditure was \$5,141,459.31
- The average amount of electoral expenditure was \$1,102,861.80

***Explanation for proposed initial cap for political party at general election***

The maximum available expenditure cap for a political party at a general election (\$8,125,000 made up of the Council amount of \$125,000 x 6 plus Assembly amount of \$125,000 x 59) exceeds the average and highest amounts of electoral expenditure by a single political party at the 2013 and 2017 general elections.

Expenditure by a political party at a general election is clearly referable to the number of endorsed candidates so it would not be fair to impose a fixed expenditure cap which applied to every political party no matter how many candidates were endorsed. This expenditure cap increases in accordance with the number of candidates endorsed by the political party.

The fact that the electoral expenditure of an endorsed candidate is taken to have been incurred by or with the authority of the political party that endorsed the candidate means that no political party is placed at an advantage or disadvantage because of the wealth or lack of wealth of a particular endorsed candidate.

Accordingly, this expenditure cap is designed to level the playing field amongst political parties by making the total electoral expenditure of each party related to the number of districts in the Legislative Assembly or regions in the Legislative Council in which a political party endorses candidates.

**(b) Expenditure cap for political party at by-election**

***Proposed initial expenditure cap for political party at by-election***

By-election	\$300,000
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***Past reported electoral expenditure for political party at by-election***

In the 2018 Darling Ranges by-election:

- There were 10 political parties which lodged by-election returns
- Total electoral expenditure for all parties was \$496,193.65
- The lowest amount of electoral expenditure of was \$0
- The highest amount of electoral expenditure was \$354,566.50 (Australian Labor Party (WA Branch))
- The average amount of electoral expenditure was \$49,619.36
- 2 political parties spent above \$100,000
- 8 of the 10 political parties spent less than \$10,000

In the 2018 Cottesloe by-election:

- There were 4 political parties which lodged by-election returns
- Total electoral expenditure for all parties was \$67,071.55
- The lowest amount of electoral expenditure of was \$2,288.97
- The highest amount of electoral expenditure was \$53,915.98 (Liberal Party of Australia (WA) Division (Inc))

- The average amount of electoral expenditure was \$16,767.88
- 1 political party spent above \$50,000
- 3 of the 4 political parties spent less than \$10,000

In the 2014 Vasse by-election:

- There were 4 political parties which lodged by-election returns
- Total electoral expenditure for all parties was \$189,924.79
- The lowest amount of electoral expenditure of was \$6,332.99
- The highest amount of electoral expenditure was \$144,883.00 (Liberal Party of Australia (WA) Division (Inc)
- The average amount of electoral expenditure was \$47,481.20
- 1 political party spent above \$100,000
- 3 of the 4 political parties spent less than \$35,000

***Explanation for initial expenditure cap for political party at by-election***

The expenditure cap for a political party at a by-election exceeds the average amounts of electoral expenditure by a political party at the 2014 and 2018 by-elections.

The expenditure cap exceeds the highest amount of electoral expenditure by a political party at the 2014 Vasse by-election and the 2018 Cottesloe by-election.

The expenditure cap does not exceed the highest amount of electoral expenditure by a political party at the 2018 Darling Range by-election (Australian Labor Party (WA Branch)). In that by-election, the Australian Labor Party (WA Branch) spent \$354,566.50 which was \$354,566.50 more than the lowest spend, \$304,947.14 more than the average spend and 71.45% of the total electoral expenditure.

This expenditure cap is designed to ensure that the highest spenders in this category do not spend significantly more compared to all other spenders and that there is less of a disparity between the lowest and highest amounts of electoral expenditure.

**Part 4: The proposed initial expenditure caps for candidates (other than endorsed candidate or candidate in group) (proposed section 175SJ)**

**(a) Expenditure caps for candidate (other than endorsed candidate or candidate in group) for general election**

***Proposed initial expenditure cap for candidate (other than endorsed candidate or candidate in group) for general election***

Candidate (other than endorsed candidate or candidate in group) for general election	\$125,000
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***Past reported electoral expenditure for candidate (other than an endorsed candidate or candidate in a group) at general election***

In the 2017 general election:

- There were 20 Independent candidates in the Legislative Assembly who lodged returns
- The total electoral expenditure for the 20 Independent candidates was \$236,820.49
- The lowest amount of electoral expenditure by an Independent candidate was \$250
- The highest amount of electoral expenditure by an Independent candidates was \$42,179.74
- The average electoral expenditure for Independent candidates was \$11,841.02

In the 2017 general election:

- There were 8 Independent candidates in the Legislative Council who lodged returns
- The total electoral expenditure for the 8 Independent candidates was \$60,220
- The lowest amount of electoral expenditure by an Independent candidate was \$0
- The highest amount of electoral expenditure by an Independent candidates was \$33,186.84
- The average electoral expenditure for Independent candidates was \$7,527.50

In the 2013 general election:

- There were 27 Independent candidates in the Legislative Assembly who lodged returns
- The total electoral expenditure for the 27 Independent candidates was \$376,716.29
- The lowest amount of electoral expenditure by an Independent candidate was \$155
- The highest amount of electoral expenditure by an Independent candidates was \$72,539.63
- The average electoral expenditure for Independent candidates was \$13,952.45

In the 2013 general election:

- There were 13 Independent candidates in the Legislative Council who lodged returns
- The total electoral expenditure for the 13 Independent candidates was \$25,384.78
- The lowest amount of electoral expenditure by an Independent candidate was \$0
- The highest amount of electoral expenditure by an Independent candidates was \$15,478
- The average electoral expenditure for Independent candidates was \$1,952.67

***Explanation for proposed initial expenditure cap for candidate (other than an endorsed candidate or candidate in a group) for general election***

The expenditure cap of \$125,000 for a candidate (other than an endorsed candidate or candidate in a group) at a general election exceeds the average and highest amounts of electoral expenditure by such a candidate at the 2013 and 2017 general elections. The expenditure cap also exceeds the average and highest amounts of electoral expenditure by all other candidates at the 2013 and 2017 general elections.

This cap ensures that those candidates who do not have the backing of a political party are not placed at a financial disadvantage when compared to those candidates who do have the backing of a political party.

**(b) Expenditure caps for candidate (other than endorsed candidate or candidate in group) for by-election**

***Proposed initial expenditure cap for candidate (other than endorsed candidate or candidate in group) for by-election***

Candidate (other than endorsed candidate or candidate in group) for by-election	\$300,000
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***Past reported electoral expenditure for candidate (other than an endorsed candidate or candidate in a group) at by-election***

In the 2018 Darling Ranges by-election:

- There were 11 candidates (including 2 Independent candidates) who lodged by-election returns
- The total electoral expenditure for all candidates was \$6,909.66
- The average amount of electoral expenditure for all candidates was \$628.15
- The total electoral expenditure for the Independent candidates was \$818
- The average amount of electoral expenditure for the Independent candidates was \$409

In the 2018 Cottesloe by-election:

- There were 7 candidates (including 3 Independent candidates) who lodged by-election returns
- The total electoral expenditure for all candidates was \$17,587.08
- The average amount of electoral expenditure for all candidates was 2,512.44
- The total electoral expenditure for the Independent candidates was \$8,290.12
- The average amount of electoral expenditure for the Independent candidates was \$2,763

In the 2014 Vasse by-election:

- There were 6 candidates (including 2 Independent candidates) who lodged by-election returns



- The total electoral expenditure for all candidates was \$3,500
- The average amount of electoral expenditure for all candidates was \$583.33
- The total electoral expenditure for the Independent candidates was \$3,500
- The average amount of electoral expenditure for the Independent candidates was \$1,750

***Explanation for proposed initial expenditure cap for candidate (other than an endorsed candidate or candidate in a group) for by-election***

The expenditure cap of \$300,000 for a candidate (other than an endorsed candidate or candidate in a group) at a by-election exceeds the average and highest amounts of electoral expenditure by such a candidate at the 2014 and 2018 by-elections. The expenditure cap also exceeds the average and highest amounts of electoral expenditure by all other candidates at the 2014 and 2018 by-elections.

This expenditure cap is designed to achieve the same end as the expenditure cap at a general election for the same category of candidate.

**Part 5: The proposed initial expenditure caps for groups (other than party groups) (proposed section 175SK)**

Note: section 80 of the *Electoral Act 1907* (WA) permits 2 or more candidates nominated in an election for a region (where more than one person is to be elected) to make a claim to the returning officer to have their names included in a group in the ballot papers to be used in that election and to have their names included in that group in the order specified in that claim. A claim may be made where all the candidates in the group are the subject of a party nomination by a particular registered political party or where the candidates in the group have been endorsed by different registered political parties. The groups are often referred to as Legislative Council groups.

**(a) Expenditure cap for group (other than party group) at general election**

***Proposed initial expenditure cap for group (other than party group) for general election***

Group (other than party group) for general election	\$125,000
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***Past reported electoral expenditure of group (other than party group) at general election***

In the 2013 general election:

- There were 6 Legislative Council groups which lodged election returns
- The total electoral expenditure for all groups was \$73,035.65
- The lowest amount of electoral expenditure was \$0
- The highest amount of electoral expenditure was \$60,566
- The average amount of electoral expenditure was \$12,172.08
- 4 of the 6 groups spent less than \$2,000

There were no returns for groups in the 2017 general election.

***Explanation for proposed initial expenditure cap for group (other than party group) for general election***

The expenditure cap of \$125,000 for a group (other than a party group) at a general election exceeds the average and highest amounts of electoral expenditure by a Legislative Council group at the 2013 general election.

This cap ensures that those candidates who do not have the backing of a political party are not placed at a financial disadvantage when compared to those candidates who do have the backing of a political party.

**(b) Expenditure cap for group (other than party group) at by-election**

***Proposed initial expenditure cap for group (other than party group) for general election***

Group (other than party group) for general election	\$300,000
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***Past reported electoral expenditure for group (other than party group) at by-election***

There are no returns available for this category for the 2014 and 2018 by-elections.

***Explanation for proposed initial expenditure cap for group (other than party group) for by-election***

The expenditure cap of \$300,000 for a group (other than a party group) at a by-election exceeds the average and highest amounts of electoral expenditure by a group at the 2013 general election.

This expenditure cap is designed to achieve the same end as the expenditure cap at a general election for a group (other than a party group).

**Part 7: The proposed initial expenditure caps for persons (other than a political party, a candidate or a group) (proposed section 175SL)**

**(a) Expenditure cap for person (other than a political party, a candidate or a group) for general election**

***Proposed initial expenditure cap for person (other than a political party, a candidate or a group) for conjoint election or general election***

Person (other than a political party, a candidate or a group) for general election	\$2 million
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***Past reported electoral expenditure for person (other than a political party, a candidate or a group) at general election***

In the 2017 general election:

- There were 19 organisations in this category which lodged election returns
- The total electoral expenditure for persons (other than a party, candidate or group) was \$7,057,476.17
- The lowest amount of electoral expenditure was \$241.67
- The highest amount of electoral expenditure was \$4,361,870 (Chamber of Minerals & Energy of Western Australia Inc)
- The second highest amount of electoral expenditure was \$844,449.95 (Australian Nursing Federation, Industrial Union of Workers Perth)
- The average amount of electoral expenditure was \$371,446.11
- 17 of the 19 organisations spent less than \$500,000
- 18 of the 19 organisations spent less than \$1 million
- The percentage difference in expenditure between the 2013 election and the 2017 election was 80.18%.

In the 2013 general election:

- There were 13 organisations in this category which lodged election returns
- The total electoral expenditure for persons (other than a party, candidate or group) was \$1,395,751.35
- The lowest amount of electoral expenditure was \$825
- The highest amount of electoral expenditure was \$602,499.07 (Unions WA)
- The second highest amount of electoral expenditure was \$423,360.43 (Royal Automobile Club of Western Australia)
- The average amount of electoral expenditure was \$107,365.48
- 6 of the 13 organisations spent less than \$10,000
- 3 organisations spent over \$100,000

***Explanation for proposed initial expenditure cap for person (other than a political party, a candidate or a group) for general election***

The expenditure cap of \$2,000,000 for a person (other than a political party, candidate or group) at a general election exceeds the average amount of electoral expenditure by such a person at the 2013 and 2017 general elections.

The expenditure cap exceeds the highest amount of electoral expenditure at the 2013 general election. The expenditure cap exceeds all but the highest amount of electoral expenditure at the 2017 election (the amount spent by the Chamber of Minerals & Energy of Western Australia Inc). The Chamber of Minerals & Energy of Western Australia Inc spent \$4,361,870 which was \$4,361,628.40 more than the lowest spend, \$3,999,0423.90 more than the average spend and 61% of the total electoral expenditure.

The expenditure cap of \$2 million is 5 times more than the average electoral expenditure for the 2017 general election. The expenditure cap also takes into

account that all but one person in this category spent less than \$1 million on electoral expenditure in the 2017 general election.

This expenditure cap is designed to ensure that the highest spenders in this category do not spend significantly more compared to all other spenders and that there is less of a disparity between the lowest and highest amounts of electoral expenditure.

**(b) Expenditure cap for person (other than a political party, a candidate or a group) for by-election**

***Proposed initial expenditure cap for person (other than a political party, a candidate or a group) for by-election***

Person (other than a political party, a candidate or a group) for by-election	\$50,000
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***Past reported electoral expenditure for person (other than a political party, a candidate or a group) for by-election***

No returns are available in respect of electoral expenditure by persons (other than a political party, candidate or group) for the 2014 and 2018 by-elections.

***Explanation for proposed initial expenditure cap for person (other than a political party, a candidate or a group) for by-election***

The expenditure cap of \$50,000 for a person (other than a political party, candidate or group) at a by-election exceeds the average and highest electoral expenditure by a candidate at the 2014 and 2018 by-elections and exceeds the average expenditure by a political party at the 2014 and 2018 by-elections.

This expenditure cap is designed to achieve the same end as the expenditure cap at a general election for a person (other than a political party, candidate or group). However, the expenditure cap is lower because this category of persons invariably spends less at by-elections.

**Part 8: Annual adjustment of cap amount (proposed section 175SM)**

The proposed initial expenditure caps will not remain in place after 1 July 2021.

A mechanism has been inserted into the Bill which will enable each of the initial expenditure caps to be adjusted. Pursuant to proposed section 175SM, cap amounts are to be adjusted each year from the financial year beginning on 1 July 2021 in accordance with the Consumer Price Index.

However, if, for a particular financial year, the adjustment of a cap amount in accordance with that section would reduce the amount, then the amount is not to be adjusted.

In addition, if the adjustment of a cap amount results in an amount that is not a whole number multiple of \$100, the amount is rounded up to the nearest whole number multiple of \$100 and that rounded amount is the cap amount for the financial year.

The annual adjustment to each expenditure cap offsets the effects of inflation. However, the adjusted amount will never be less than the initial expenditure cap.

The annual adjustment of expenditure caps will ensure that the "political arms race" proceeds at a more leisurely pace in the future when compared with past increases in total electoral expenditure.